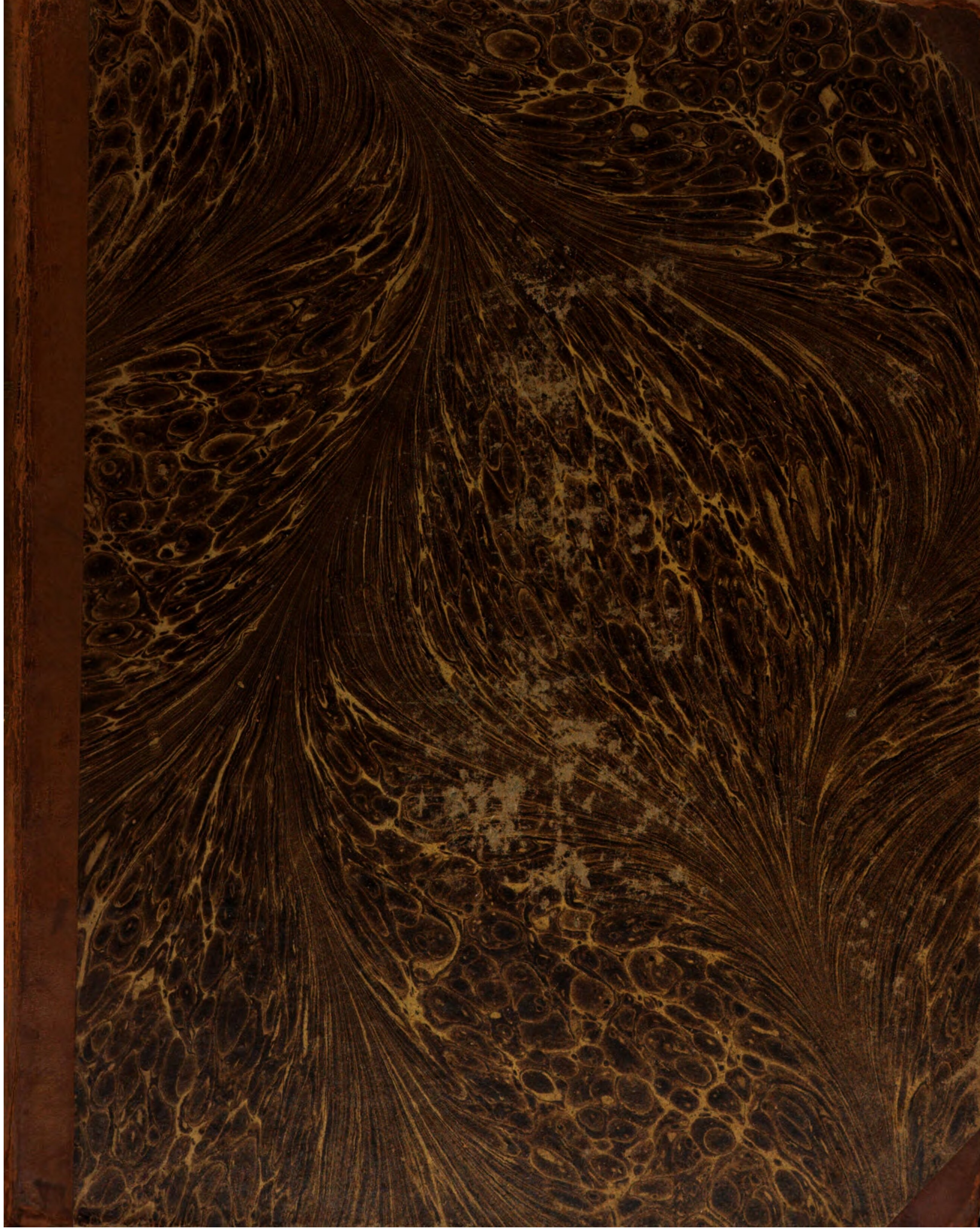
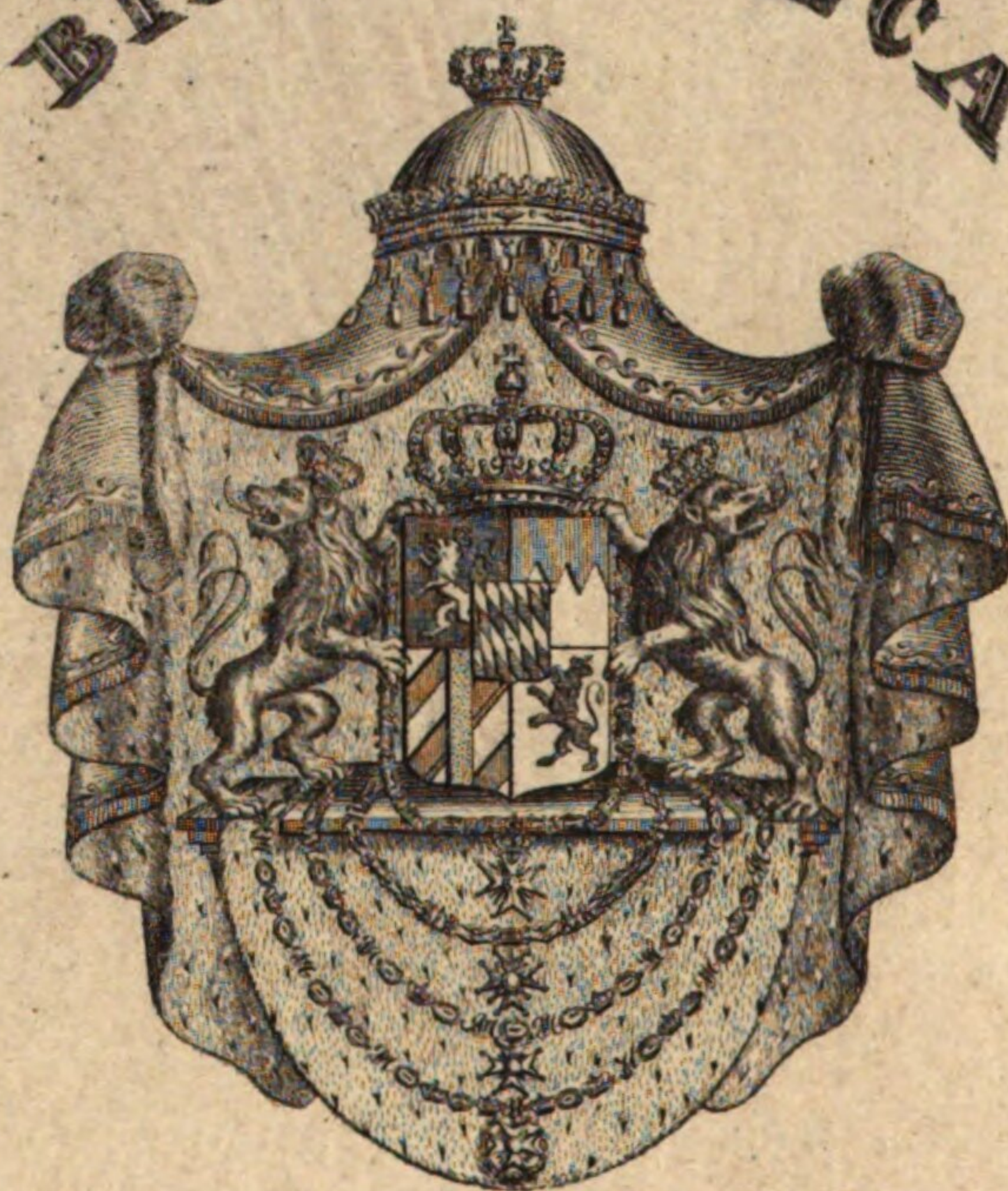




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THE
HEDAYA, OR GUIDE;

A
WARREN HASTINGS
COMMENTARY

ON THE
MUSSULMAN LAWS:

TRANSLATED BY ORDER OF THE
GOVERNOR-GENERAL AND COUNCIL
OF

B E N G A L,

BY
CHARLES HAMILTON.

VOL. I.

L O N D O N:
PRINTED BY T. BENSLEY.

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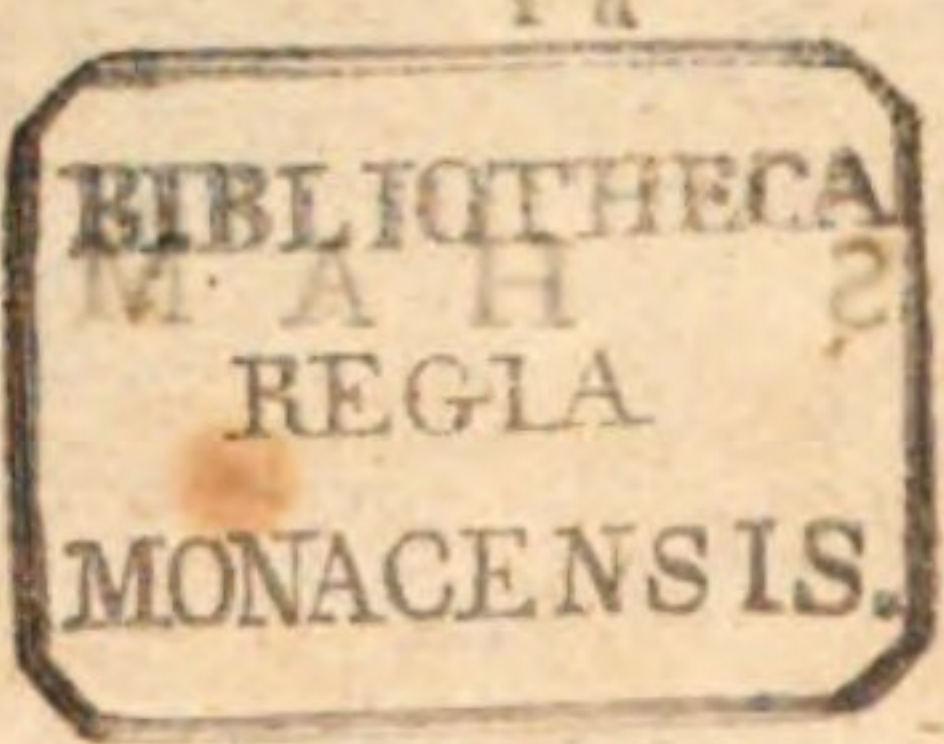
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BENGAL.

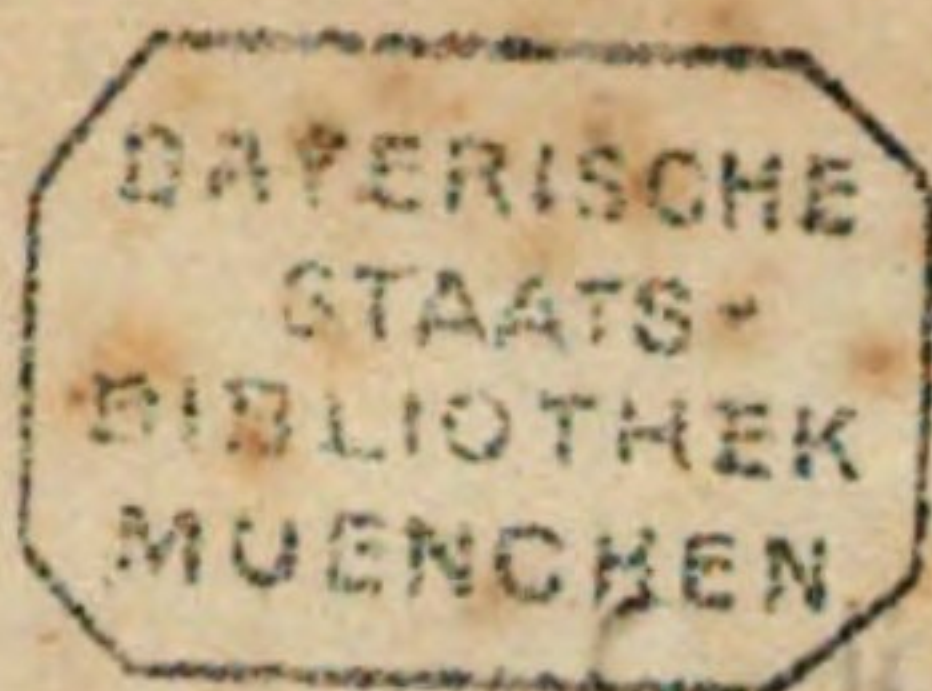
BY
CHARLES HAMILLTON.



VOL. I.

LONDON:
PRINTED BY T. BENNETT

M DCCC XXXI



T O
WARREN HASTINGS, Esq;

DATE

GOVERNOR-GENERAL OF BENGAL, &c.

SIR,

AFTER the labour of several years, I am
at last enabled to present you with a translation of the
HEDAYA.

To you, SIR, I feel it incumbent on me to inscribe a
work originally projected by yourself, and for some time
carried on under your immediate patronage.—However
humble the translator's abilities, and however imperfect the
execution of these volumes may be, yet the design itself
does honour to the wisdom and benevolence by which it
was suggested; and if I might be allowed to express a hope
upon

upon the subject, it is, that its future beneficial effects, in facilitating the administration of Justice throughout our Asiatic territories, and uniting us still more closely with our *Musfulman* Subjects, may reflect some additional lustre on your Administration.—I have the honour to be, with the utmost respect, and the most lively gratitude and esteem,

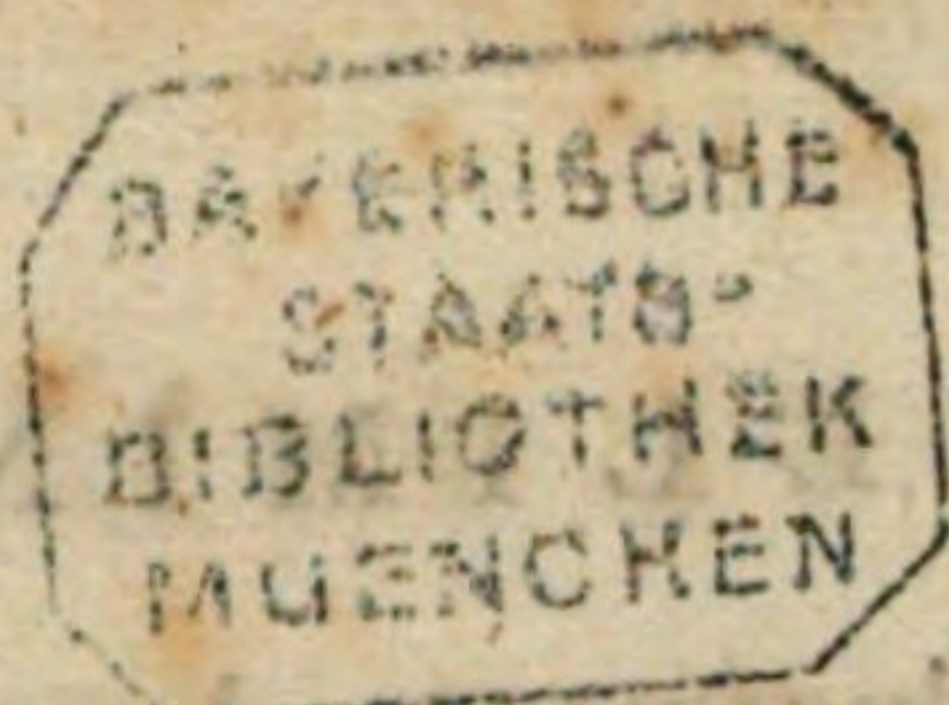
S I R,

Your most obedient,

and most humble Servant,

CHARLES HAMILTON.

PRE-



PRELIMINARY DISCOURSE,

BY THE

TRANSLATOR.

THE diffusion of useful knowledge, and the eradication of prejudice, though not among the most brilliant consequences of extended empire and commerce, are certainly not the least important.—To open and to clear the road to science; to provide for its reception in whatever form it may appear, in whatever language it may be conveyed:—these are advantages which in part atone for the guilt of conquest, and in many cases compensate for the evils which the acquisition of dominion too often inflicts.

PERHAPS the history of the world does not furnish an example of any nation to whom the opportunity of acquiring this knowledge, or communicating those advantages, has been afforded in so eminent a degree as GREAT BRITAIN.—To the people of this Island the accession of a vast empire, in the bosom of ASIA, inhabited, not by hordes of barbarians, but by men far advanced in all the arts of civilized life, has opened a field of investigation equally curious and instructive.—Such researches must ever be pleasing to the speculative philosopher, who, unbiassed by the selfish motives of interest or ambition, delights in perusing the great and variegated volume of SOCIETY:—but to *us* they come recom-

mended by no *ordinary* inducements ; knowing, and feeling, as we ought, how much the preservation of what we have obtained depends upon the proper use of our power ; and upon the right application of those means which PROVIDENCE has placed in our hands for continuing, and perhaps increasing, the happiness of a large portion of the human race.

THE permanency of any foreign dominion (and indeed, the justification of holding such a dominion) requires that a strict attention be paid to the ease and advantage, not only of the *governors*, but of the *governed* ; and to this great end nothing can so effectually contribute as preserving to the latter their ancient established practices, civil and religious, and protecting them in the exercise of their own institutes ; for however defective or absurd these may in many instances appear, still they must be infinitely more acceptable than any which *we* could offer ; since they are supported by the accumulated prejudice of ages, and, in the opinion of their followers, derive their origin from the Divinity himself.

This salutary maxim was wisely adopted by the servants of the EAST INDIA COMPANY on the first acquisition of our *BENGAL* territories ; and to a steady adherence to it much of the present flourishing state of those provinces must be attributed.

THE judicial regulations both of the *Hindoos* and the *Mohammedans* are, in fact, so intimately blended with their religion, that any attempts to change the former would be felt by them as a violation of the latter ; and should the wisdom of the British legislature ever suggest the expediency of introducing an uniform system of jurisprudence among them, it will, at the same time, dictate the necessity of preserving sacred and unaffected an infinite number of usages, essential to the ease and happiness of a people differing from us as widely in customs, manners, and habits of thinking, as in climate, complexion, or language.—Towards the accomplishment of such an important system, every effort which may tend to develope their *Laws* is undoubtedly a step, and therefore carries with it its own recommendation.—It was this more remote consideration,

sideration, as well as the *immediate* advantages to be derived from it, which dictated the compilation of the HINDOO CODE: and it was the same motive which gave rise to the present publication.

MANY centuries have elapsed since the *Mussulman* conquerors of *INDIA* established in it, together with their religion, and general maxims of government, the practice of their courts of justice.—From that period the MUSSULMAN CODE has been the standard of judicial determination throughout those countries of *INDIA* which were subjugated by the *Mohammedan* princes, and have since remained under their dominion. In one particular, indeed, the conduct of the conquerors materially differed from what has been generally considered in Europe (how unjustly will appear from many passages in this work) as an invariable principle of all *Mussulman* governments; namely, a rigid and undeviating adherence to their own LAW, not only with respect to themselves, but also with respect to all who were subject to their dominion.—In all *spiritual* matters, those who submitted were allowed to follow the dictates of their own faith, and were even *protected* in points of which, with respect to a *Mussulman*, the LAW would take no cognizance.—In other particulars, indeed, of a *temporal* nature, they were considered as having bound themselves to pay obedience to the ordinances of the LAW, and were of course constrained to submit to its decrees.—Hence the HINDOOS enjoyed, under the *Mussulman* government, a complete indulgence with regard to the rites and ceremonies of their religion, as well as with respect to the various privileges and immunities, personal and collateral, involved in that singular compound of allegory and superstition.—In matters of *property*, on the contrary, and in all other temporal concerns, (but more especially in the *criminal* jurisdiction,) the *Mussulman* law gave the rule of decision, excepting where both parties were *Hindoos*, in which case the point was referred to the judgment of the *Pundits*, or *Hindoo* Lawyers.—It is true, this statement rather accords with the *spirit* of the *Mohammedan* laws, than with the *practice* of them; for it too frequently happened that little regard was paid either to judicial ordinance or natural equity.—Where avarice and bigotry are united with despotic power, such a

a 2

combination

combination will occasion abuses, and corrupt the streams of justice.—Accordingly, the *Hindoos* were in many instances exposed to unfair and partial decisions, but more particularly where a *Mussulman* was concerned, in which case the law of MOHAMMED was doubtless often misinterpreted, and wrested to the purposes of injustice, or (which was an evil of equal magnitude) the decree was the result of a *bargain* between the magistrate and the highest bidder.—Still, however, these abuses did not alter the spirit of the law, which continued unvaried in its ostensible operation; the *Mussulman* courts determining in all matters of a *criminal* nature, without exception, and in every case of *Mussulman* property; and admitting of appeals to the *Hindoo* Lawyers (for there are no regular *Hindoo* courts of justice) only in cases where the *Mussulman* law had made no provision, or in which no *Mohammedan* had any interest.

SUCH was the state of jurisprudence in the *BENGAL* provinces, when a wonderful revolution threw the government of them into the hands of the *ENGLISH*.

LITTLE acquainted with the *forms*, and still less with the elementary *principles*, of the native administration of justice in their newly acquired territories, the British government determined to introduce as few innovations in those particulars as were consistent with prudence; and the only material alteration which, in course of time, took place, was the appointment of Company's servants to superintend and decide, as *Judges* in the civil *Mussulman* courts, and as *Magistrates* with respect to the criminal jurisdiction.—An important change was indeed effected in the administration of both justice and revenue, so far as affected the distinctions hitherto maintained between *Mussulmans* and *Hindoos*. Of these the latter had always been subject to *double* taxes, and imposts of every denomination, levied on principles which are fully explained in the course of the present work: and they also laboured under particular inconveniences and disadvantages in every judicial process, (especially where the

the litigating adversary was a *Mussulman*) some of which have been already noticed.—By the British government both have been placed, in these points, upon an exact equality; and the *Hindoo* and *Mussulman*, respectively, have their property secured to them under that system which each is taught to believe possessed of paramount authority: but where their interests clash in the same cause, the matter is necessarily determined by the principles of the *Mussulman* law, to which long usage, supported by the policy of the *Mogul* government, has given a sort of prescriptive superiority.—Still, however, though much was effected, much remained to be done.—The gentlemen who were appointed to superintend the proceedings of the courts, having had no opportunity of studying the languages in which the laws are written, were constrained, in their determinations, to be guided by the advice of the native officers—men sometimes themselves too ill informed to be capable of judging, and generally open to corruption.—Hence appeared the necessity of procuring some certain rule whereby those gentlemen might be guided, without being exposed to the misconstructions of ignorance or interest, and which might enable them to determine for themselves, by a direct appeal to the *Mussulman* or *Hindoo* authority on the ground of which they were to decide.—A compilation was accordingly formed, under the inspection of the most learned *Pundits*, (*Hindoo* Lawyers,) containing an abstract of the *Hindoo* laws, the translation of which into English was committed to Mr. HALHED; and, shortly after this was accomplished, a number of the principal *Mohammedan* professors in Bengal were employed in translating from the *Arabic* into the *Persian* tongue a commentary upon the *Mussulman* law, called the *HEDAYA*, or *Guide*, a work held in high estimation among the people of that persuasion. The *English* version of that commentary is now submitted to the public.

BEFORE the Translator proceeds to give an account of this work, it may be proper to say something concerning the LAWS of which it treats.

THE *Mussulman* LAW proceeds, in its determinations, upon two grounds; the text of the KORAN, and the *Sonna*, or oral law, corresponding with the *Mishna* of the Jews.

THE KORAN (or, as it is more commonly termed, AL KORAN) is considered by the *Mussulmans* as the basis of their law; and is therefore, when applied to judicial matters, entitled, by way of distinction, *al Shàrra*, or THE LAW, in the same manner as the Pentateuch is distinguished by the JEWS.

Who was the real *Author* of this extraordinary compound of declamation and precept, must for ever remain a matter of uncertainty, since on this point much difference of opinion obtained, even among the earliest opponents of MOHAMMED and his pretended mission.—That this extraordinary person, however, was himself the principal *projector*, is beyond dispute, although it be probable that he received much assistance from others in the composition of it.—By all orthodox *Mussulmans*, the original is believed to have existed from eternity, inscribed on the tablet of the divine decrees, which stands close by the throne of GOD, and contains the predestined fate of MEN and things.—From this tablet a copy of it is supposed to have been taken by the angel GABRIEL, and conveyed to the *Simma Asfi*, or lowest heaven, where it was by him revealed to the Prophet in various portions, and at different times.—In fact, it was delivered by *Mohammed* piece-meal to his followers, according as the occasion dictated, or as any particular emergency required: nor was it arranged together, in its present form, until the reign of his friend and successor, the *Khàlif* ABOO BEKR, who ordered the whole to be collected from the leaves or skins on which the passages had been written, and also from the mouths of such of the surviving companions of the Prophet as had committed them to memory, and inserted in one volume, but without any regard to the order of their original promulgation.—Much difference, however, was soon perceptible in the several copies of
 6 this

this work; wherefore OTHMAN, the second succeeding *Khalif*, to remedy the growing evil, directed a number of copies to be transcribed from this of ABOO BEKR, and ordered all others to be destroyed.—The precepts of the KORAN are of two descriptions, prohibitory and injunctive. In the application of them to practice they are always considered as unquestionable and irrefragable, except where one passage has been contradicted, and consequently repealed, by a subsequent passage, some instances of which are cited in the course of this Commentary.

SONNA is a word which (among a variety of other senses) signifies *custom, regulation, or institute*. The *Sonna* (or, as it is expressed among the *Arabs*, by way of distinction, *Al-Sonna*) stands next to the KORAN in point of authority, being considered as a kind of *supplement* to that book. It forms the body of what is termed the *oral* law, because it never was committed to writing by the *Arabian* Legislator, being deduced solely from his traditionary precepts or adjudications, preserved from hand to hand, by authorised persons, and which apply to many points of both a spiritual and temporal nature, not mentioned or but slightly touched upon in the KORAN.—These traditions * are divided, by the *Mussulman* commentators, into two classes: I. the simple sayings of the Prophet from his own uninspired judgment; II. sayings from divine inspiration. The former are termed *Hadees Nabwee*, or traditions of the PROPHET; the latter *Hadees Koodsee*, or *divine* traditions; and both have the force of laws.—After MOHAMMED's death, they were at first quoted by his companions merely in order to decide occasional disputes, or to restrain men from certain actions which the PROPHET had prohibited: and thus, in process of time, they became a standard of judicial determination. The

* The Translator, speaking of the *Sonna*, uses the word *traditions*, in compliance with custom, which, among Europeans, has applied this term to all the oral precepts, &c. of MOHAMMED.—*Hadees* (pronounced, among the *Arabs*, *Hadeeth*) properly signifies an *occurrence* or *event*. Some *Mussulman* commentators define it to mean “an *emanation*,” and understand it particularly in this sense when applied to the sayings or actions of their Prophet.

first collection of them was made in the *Khàlifat* of ALËE; and, in after times, many pious men employed themselves in making those collections.—There are, besides these, a multitude of traditions cited by the *Mussulman* commentators, concerning the acts and sayings, not only of their PROPHEt, but also of his COMPANIONS and immediate successors; which, though not of equal authority, are nevertheless admitted to have some weight as *precedents* in judicial decisions, when not repugnant to reason, or contradicted either by the KORAN or the SONNA. Upon the *Sonna* a great number of volumes have been written, under the titles of *Sonnàn* *, *Rawàyat* †, and *Hawàdees* ‡, several of which are quoted in the course of this work, and will be more particularly mentioned when we come to treat of *authorities*.

PRACTICAL DIVINITY, also, is admitted to have its due weight in judicial determinations, even among the orthodox. As used by the *Mussulman* Lawyers, it chiefly consists of casuistry, and analogous applications to, or deductions from, cases already determined upon by the more certain standards of the KORAN or *Sonna*; the nature of which will be more fully explained by the perusal of a single page of the work than by any illustration that could be offered.

HAVING stated thus much with respect to the *foundations* of the *Mussulman* LAW, we shall next endeavour to account for those varieties which at present appear in the superstructure;—but before we proceed to this it will be proper to enter into a short detail of the events in which originated the first great schism among the followers of MOHAMMED.

HAD the impostor of *Mecca* left, at his decease, any male heirs, it is possible that the distinction to which he rose would have been transmitted without question to his posterity. In this however he was disappointed,

* Institutes.

† Reports. Traditions.

‡ Occurrences. Emanations.

his five sons having all died in their infancy.—He had indeed four daughters by his first wife KHADIJA, of whom one alone survived him, his favourite FATIMA, the wife of ALEE; but a female was universally deemed incompetent to be the leader of the FAITHFUL.

ALEE *, as the nearest relation of the prophet, the husband of his daughter, and the lineal chief of his family, aspired to the succession, with hopes founded not less on his personal merit than his conjugal and hereditary claims.—When MOHAMMED was seized with his last illness, his son-in-law probably expected a nomination in his favour.—His views however were frustrated; and his pretensions for the present defeated.—AYSHA †, the stepmother of FATIMA, had always entertained an antipathy against him; and, by exerting her influence with the dying Prophet, easily prevented him from making any declaration which might determine the *Mussulmans* in favour of the descendant of HASHIM.—From this circumstance, on the decease of MOHAMMED, his followers became divided into several factions.—The people of *Medina* were desirous of raising SAAD, one of their countrymen, to the dignity of *Imâm*, or chief; whilst the *Meccanites*, considering his advancement as subjecting them to a foreign domination, declared their intention of electing a chief among themselves.—Had such a design been carried into effect, it must, in its consequences, have destroyed altogether the newly established religion; and by crushing the rising empire of *Islamism* in its infancy, would have restored the *Arabs* to their primitive barbarism and idolatry.—The prudence or policy of OMAR, and some other of the principal companions, interfered; and they proposed, in order to avoid the dangerous schism which this must occasion among the *Mussulmans*, that all parties should, without distinction, unite in the election of a successor to the

* ALEE BIN ABEE TALIB, cousin German of MOHAMMED, and, with him, descended from *Hâshim Abdalminâf*, from whom the *Hâshimee* tribe derives its title.

† The daughter of *Abou Bekr*, styled, by the *Mohammedans*, OM al MAWMENEEN, or Mother of the FAITHFUL.

Prophet, who as such should be universally obeyed.—The matter was not settled without much contention: but at length ABOO BEKR, the father-in-law of MOHAMMED, who had exerted himself as a mediator among the disputants, was unanimously elected by the *elders*, and acknowledged by the people.—It was in vain that the *Hāshimees*, and other partizans of ALEE, vehemently opposed this defeasance of his right, and obstinately maintained that he alone had an indisputable and exclusive claim to succeed, as well on account of his near relation to MOHAMMED, as because of a declaration of the latter to that effect*.—Their remonstrances were disregarded, their clamours drowned amidst the acclamations of the multitude, and they were compelled to remain satisfied with refusing to acknowledge the *Khālīf*.

ALEE himself retired from the scene of his mortification, and sustained the disappointment of his ambition with silent disgust; nor did he pay his homage to the appointed “COMMANDER OF THE FAITHFUL” until some time after, when the death of his wife *Fātima* had weakened his party, and he perceived that a perseverance in his dissent might indeed create strife, but could not be productive of advantage.

WITHIN little more than two years after his elevation, *Aboo Bekr*, finding himself attacked by a mortal distemper, nominated *Omar* to be his successor, who accordingly assumed the title without opposition, and after a most successful and victorious reign of above ten years, died of a wound he received from one *Firooz*, a *Persian* slave, whom he had offended by a sarcastic observation concerning a suit which the slave had referred to his tribunal.—When dying, OMAR refused to appoint any particular successor, declaring the *Khalifat* to rest among six persons, who should succeed to each other agreeably to the order of their election or ballot; namely, ALEE, OTHMAN, SAAD, ABDULRIHMAN, TALHA, and ZOBAIR. Of these ABDULRIHMAN agreed to forego his right altogether,

* The story cited by the partizans of ALEE, on this occasion, is related at length, in treating of the term *Māwla*. (See MANUMISSION, vol. I. p. 425.)

provided he might have the privilege of naming the successor to OMAR; a proposal to which all his colleagues assented, except only ALEE, who took this opportunity to urge his superior and exclusive pretensions to the *Khalifat*. ABDULRIHMAN, however, notwithstanding his opposition, being supported by his four other colleagues, offered the *Khalifat* to OTHMAN, and he was proclaimed and recognized as successor to the PROPHET, and sovereign of the *Mussulmans*. ALEE, on this second defeat, acted with a moderation which, however laudable in itself, was much blamed by some of his adherents. He paid his homage to OTHMAN without murmuring, and appeared content to submit to the success of his competitor.

IF OTHMAN was really desirous of the rank which he had thus attained, he exhibited a powerful instance of the delusions of ambition! Whilst his armies were extending the empire of *Islàm* in every direction, and penetrating into *Khorasan* and *Mauritania*, the venerable *Khàlif* found his reign disturbed by intestine commotions, and his person exposed to the violence of faction. His declining age had unnerved his arm; he was unable to hold the reins of dominion with the steady hand of his predecessors; and he, perhaps too late, discovered that he had undertaken a task to which he was unequal.—The governors of his provinces, encouraged by the growing imbecility of their prince, plundered and oppressed those whom it was their duty to cherish and protect.—He had disobliged AYSHA, “*the Mother of the FAITHFUL*,” who excited a powerful cabal against him at *Mecca*, whilst ALEE and his discontented *Hashimites* connived at, perhaps inflamed, these disorders. The malcontents at length being joined by the deputies from the oppressed subjects of *Egypt* and *Syria* took to arms, and OTHMAN found himself besieged in his own palace.—Superstition and respect for a time withheld the assailants. Their scruples, however, were soon overcome: they forced the gates; and the unfortunate *Khàlif* expiated his errors or his weakness by his blood.

THE insurgents, upon the murder of OTHMAN, made ALEE an offer of the *Khalifat*; which, with the consent of his colleagues TALHA and ZOB AIR, (already mentioned,) he accepted.—He was publicly proclaimed *Khàlif* within a short time after, and at the distance of twenty-four years from the period of his first aspiring to that dignity.

IN obtaining, however, this long-sought object, ALEE soon found himself embarked upon a tempestuous ocean, and the storm ended only with his life.—Conscious that the concern he was generally, and perhaps justly, suspected to have in the death of OTHMAN would not fail to alienate from him all those who were connected with that *Khàlif*, or whom he had advanced, one of his first steps was, to effect a general removal of the governors who had been appointed by his predecessor. This bold and dangerous measure excited much disgust in all the provinces, but more particularly in *Syria*, where MOAVIAH, to whom the care of that region had been entrusted by OTHMAN, and who was nearly related to him, excited a strong party against ALEE, and openly declared his resolution of avenging upon him the death of his kinsman. At the same time TALHA and ZOB AIR were disgusted with ALEE, because of his having refused to them the governments of *Koofa* and *Basra*; and understanding that AYSHA, the widow of *Mohammed*, had retired from *Medina* (then the seat of the *Khalifat*) to *Mecca*, followed her thither. At *Mecca* a powerful faction was excited against *Alee*, particularly among the tribe of OMMIAH; and these being joined by the dismissed governors of the provinces, and having *Aysba* at their head, collected a powerful army, determining to depose ALEE by force, and set up MOAVIAH as *Khàlif* in his room.—Thus was excited the first civil war among the *Mussulmans*; and hence originated the dissensions which have ever since obtained between the opponents of ALEE and his adherents.

ALEE, with undaunted resolution, faced, and for the present repelled, the threatening storm. He met the insurgents, and, after a bloody conflict, gave them a complete overthrow, in which TALHA and ZOB AIR were

were slain, and AYSHA taken prisoner, whom the *Khàlif* treated with the utmost respect, and sent her back, with honourable attendance, to *Mecca*.

AFTER this victory, ALEE remained complete master of *Arabia*. But he still found himself opposed by a powerful party in *Syria*; for MOAVIAH, having retired to *Damascus*, and being there joined by all the relations of OTHMAN, was publicly acknowledged by those as *Khàlif* and *Commander of the FAITHFUL*.

PERHAPS the mere effort of a faction at *Damascus* would not, of itself, have availed to shake the throne of ALEE, confirmed as it was by his recent signal success. But the pretensions of his competitor were supported, on this occasion, by the celebrated AMROO *ibn al As*, the most puissant and popular of all the *Mussulman* commanders. This chieftain had conquered Egypt during the *Khalifat* of OMAR; had afterwards been recalled by OTHMAN; and, at the period of his death, and the investiture of ALEE, commanded in *Palestine*.

To gratify some particular resentment against the son-in-law of the Prophet, or, more probably, induced by his attachment to the house of OMMIAH, he repaired from *Jerusalem* to *Damascus*, and took the oaths to MOAVIAH. He pledged himself to obey and maintain the usurper as the only true and legitimate leader of the FAITHFUL. Such was his influence that the multitude immediately joined their acclamations, and flocked to the standard of the *Syrian Khàlif*. The civil war was thus rekindled. The armies of the contending *Khàlifs* prepared for battle, and ALEE was once more on the point of defeating his enemies, when they were saved by the stratagem of fastening some KORANS to the ends of their spears; for the troops of ALEE, beholding the sacred volumes thus exposed, could not be prevailed upon to advance to the encounter. Soon after these proceedings a truce was agreed upon, and the competitors engaged to retire to their respective capitals, *Koofa* and *Damascus*.

cus, leaving their claims to be decided by a reference, to the award of which each party bound himself to adhere.

AMROO was appointed referee on the part of MOAVIAH, and the less artful ABOO MOOSA on that of ALEE. In the course of their conferences, AMROO had the address to persuade his co-arbiter that, in order to restore peace to the *Mussulmans*, it was absolutely necessary to depose both their principals, and to elect a *Khàlif* who should meet the approbation of all parties: and for this purpose a tribunal was erected between the two armies. ABOO MOOSA first mounted, and proclaimed the deposition of ALEE and MOAVIAH. AMROO succeeded him, and announced MOAVIAH “as the legal *Khàlif*, who had been nominated by OTHMAN, and “stood pledged to revenge his blood.” The friends of ALEE, supposing this to be done with his connivance, retired from the place astonished and discouraged. When recovered from their confusion and surprise, the compromise was declared void. Each party proceeded to vilify and excommunicate the other; and the anathemas uttered on this occasion have continued to be solemnly repeated ever since, in the mosques of the respective sects, as one of the offices of religion. The war was resumed with greater fury than ever. AMROO was dispatched into *Egypt* with a considerable force, and seized the government of that province in the name of MOAVIAH. The *Mussulmans*, instead of seeking foreign enemies, turned their swords against each others breasts; and the power of their empire was likely to perish by an internal disease, when an event took place which, for the present, put an end to the contest, and restored *peace*, if not *unity*, among them.

THREE of the *Khàregites* (*insurgents* against ALEE) happening to meet at the temple of MECCA, discoursed concerning the many friends and companions they had lost in this fruitless war, and deplored their deaths, as well as the danger which threatened the general cause from a continuance of those unhappy divisions.—One of them at length, in an extasy of fanaticism and despair, proposed to end these troubles at once by the death of ALEE, MOAVIAH, and his friend AMROO.—His two comrades

rades immediately agreed to take their share in this desperate enterprize.—They prepared their daggers, and proceeded,—one for *Damascus*, another for *Egypt*, and the third for *Koofa*; each fully resolved to sacrifice his allotted victim.—The event proved that their determination was as firm as their undertaking was desperate: but one only succeeded.—The first, having arrived in *Egypt*, mistook the person of AMROO, and stabbed another who happened to preside that day in the character of *Imâm* in his stead;—and on being conducted to punishment, satisfied himself with exclaiming, “I intended to strike AMROO, but GOD willed it should be “another.”—The second repaired to *Damascus*, there wounded MOAVIAH, but not mortally, and was suffered to live long enough to discover the conspiracy.—The third accomplished his sanguinary purpose.—Having arrived at *Koofa*, and engaged two assistants, he, on Friday the 17th of *Ramzan*, A. H. 40, waylaid the *Khàlif* as he was going to the *Mosque*, and gave him a wound, of which he soon after died.

THUS perished ALEE, after a short and turbulent reign of four years and nine months.—His partizans, however, were not dismayed by this event.—The murdered *Khàlif* left several children by nine different wives; the two eldest, HASSAN and HOOSEIN, by FATIMA the daughter of *Mohammed*, during whose lifetime he contracted no other marriage.

HASSAN was by his adherents proclaimed *Khàlif* on the death of his father; but MOAVIAH, who had assumed the dignity of *Khàlif* in *Egypt* and *Syria* some time before, was in possession of those countries, and refused to acknowledge him on account of the suspicion which attached to him as being concerned in the death of OTHMAN.—Hence a new competition arose, which could not have failed to rekindle the flame of war, had not HASSAN, who inherited more the *piety* than the *valour* of his predecessor, and was more ambitious to distinguish himself in the performance of religious ceremonies than in the support of his regal pretensions, agreed to relinquish his claim in favour of his rival; and thus was transferred the dignity of the *Khalifat* from the tribe of HASHIM to that of OMMIAH.

HASSAN,

HASSAN, upon resigning the *Khalifat*, retired to *Medina*, and there lived in privacy until A. H. 49, when he died, poisoned, as the *Shiyas* alledge, by his wife, at the instance of MOAVIAH, who dreaded the possibility of his renewing his pretensions.

HOOSSEIN possessed a larger portion of the martial spirit of ALEE than his elder brother; but his fate was not more fortunate.—On the death of MOAVIAH, having refused to acknowledge his son YEZEED, (who succeeded to the *Khalifat*, A. H. 60,) he was constrained to retire for safety from *Medina* to *Mecca*, whither the people of *Koofa*, who were strongly attached to the family of ALEE, sent him an invitation to join their standard, after having proclaimed him the only lawful *Khalif*, and declared YEZEED to be an usurper.—YEZEED, understanding that HOOSSEIN had accepted this invitation, and set out from *Mecca* for *Koofa*, dispatched OBEYDOOLA, one of his commanders, to intercept him; and OBEYDOOLA, meeting him passing over the plain of *Kerballa*, with only seventy-three of his family and attendants, cut to pieces the grandson of the Prophet and the whole of his feeble party.—In this indiscriminate massacre also perished four other sons of ALEE, namely, ABDOOLA, ABBAS, OTHMAN, and JAFIR, together with one or more of his daughters.—The wretched remains of his family were afterwards brought before YEZEED, who was advised to seize the present opportunity, and to cut off all future causes of disturbance, by extirpating this remnant of the Prophet's descendants.—This flagitious proposal filled the *Khàlif* with horror. He repented of the blood which had been already shed, execrated the sanguinary obedience of OBEYDOOLA, and dismissed the captives with honour to the tomb of their father at *Koofa*.

FROM this period the posterity of ALEE sunk into obscurity and insignificance, except in the eyes of their sectaries.—Their descendants, however, under the title of *Seyids*, have spread over *India*, *Persia*, *Turkey*, and the northern coast of *AFRICA*, are held in veneration by the multitude

as inheriting the blood of the Prophet, and have frequently excited the jealousy of the reigning princes of *Arabia* and *Turkey*.—In *Persia* and *India*, particularly, the memory of ALEE and his sons is cherished, among the people, with a veneration approaching to idolatry; and the latter country exhibits some striking instances of the force of this partiality, which possibly a long lapse of time, instead of weakening, has rather contributed to strengthen.—The *Mussulman* Princes of *HINDOSTAN* are, in general, *Soonis*, as well as most of their chief men, the heads of the law, or the ministers of state, whilst the great body of *Mohammedans*, being descended from a *Persian* stock, or from the proselytes of the first *Mohammedan* conquerors, adhere rigidly to the principles of the *Shiyas*.—The *Nizàm*, one of the most powerful and independant of those princes, cannot attend public worship in the *Jàmá* mosque of his capital (*Hydrabad*) because of the *Anathemas* weekly uttered there against the usurping *Khàlifs* of the house of *Ommiah*.—At *Lucknow*, on the tenth of *Moharrim*, the effigy of *Omar* (who, as being the first proposer of an elective *Khàlifat*, in prejudice to the right of ALEE, is regarded by his adherents with particular abhorrence,) is set up, filled with sweetmeats, as a mark to shoot arrows at; and, after being used with every species of indignity, is torn to pieces, and its contents devoured by the enthusiastic votaries of ALEE.—This day is throughout these regions observed as the anniversary of the death of *Hossein* and his brethren, and celebrated by songs and processions. The magnificent *Mausoleums* erected to the memory of these illustrious martyrs are still visited by their adherents, who regard this token of respect as scarcely less meritorious than a pilgrimage to the *Käba* itself; and the real or fictitious descendants from this sacred stock have, at different times, made their affinity to the Prophet a pretext for assuming the regal or pontifical authority in *Syria* and *Africa*.—They claim, moreover, a certain pre-eminence, and exclusive privileges, to some of which they are admitted, even in *Turkey*, where the memory of ALEE is least respected, and the pretensions of his line to the *Khàlifat* utterly denied.—A few slight traces of their assumed superiority may be discovered in this commentary.

THUS early divided on a subject which involved at once the interests of individuals, and the prejudices of superstition, it was not to be expected that the followers of MOHAMMED should long continue to observe an uniformity of practice or of doctrine.—The first controversies began, of course, between the retainers of ALEE and their opponents. When the contending parties proceeded openly to anathematize each other, the mutual change of heterodoxy was not confined merely to the appointment of an *Imâm*, but soon advanced to comprehend the expositions of the LAW in other matters both of spiritual and temporal concern. Each faction reproached the other with disbelieving, perverting or misunderstanding, the sacred text of the KORAN.—Notwithstanding the pious attempt of the *Khàlif* OTHMAN to restore a literal uniformity in the several copies of this work, (as already noticed,) still, from the nature of the composition, as well as from the character in which it was preserved, there was abundance of room in many places for a variety of constructions, independant of any particular interest which might mislead the understanding, or at least the inclinations, of mankind.—Its contents are distinguished under two heads, the *محکمات* or perspicuous, and the *متشبهات* or enigmatical, the latter of which each commentator might explain in the way most agreeable to himself, or best coinciding with the tenets of his particular sect.—The whole was, moreover, committed to writing in the *Koreish* character, the *Arabic*, into which it was afterwards transcribed, being of later invention; and as this last was destitute of vowels, the sense of course depended much on the pronunciation of the *Mokris*, or readers, whence, upon the introduction of the *vocal points*, a variation took place in the copies, according to the manner of the reader upon whose authority these were inserted.

THE traditions also opened a copious field for disputation. No authentic collections of them having been compiled until all or most of the Prophet's companions were dead, they existed, for above a century, merely in the memories of the *Arabians*. Thousands were of course promulgated by their leaders as the occasion or the passion of the moment happened

happened to dictate : they swelled into a number exceeding all possibility of belief* : every collector assumed the right of erecting to himself a standard of selection : none would or could believe in all ; and some boldly disregarded or rejected them *in toto*, as affording no authentick rules for faith or conduct.

FROM these circumstances attending their authorities, the disputants found an ample field on which to exercise their polemical talents.—This literary warfare was indeed, for some time, confined to the original causes of their disagreement ; and, excepting those, they touched merely on points of a speculative description.—This, however, opened the way to the various heterodoxies of the scholastic divines. Abstracted subtleties and metaphysical distinctions were, by degrees, substituted for the precepts of the LAW ; and the controversial factions became divided and subdivided into parties innumerable.

IT is proper, however, to remark, that a difference of tenets did not enter into judicial decisions until upwards of a century after the death of ALEE, when it was occasioned by the defection of HANEEFA from the party of the *Shiyas*, of which more shall be said when we come to speak of that doctor.

IN stating thus much, we have endeavoured to give a summary view of the first great schisms in *Islamism* ; but we have only ventured to sketch an *outline* of the picture, without any reference to collateral events, the recital of which is more properly the province of the historian.—Having dismissed this topic, we proceed to give some account of those eminent persons whose discussions occupy a considerable portion of this work, and whose doctrines and opinions are generally admitted as of binding authority at the present day.

* ABI DAOOD has left a selection of 40,000 out of 500,000 ; and IBN HANBAL gives us, in his *Mosueined*, 37,000 out of 750,000 of those real or pretended precepts of the Prophet.

IN every system of religion ORTHODOXY and HERESY are merely relative terms. Mankind, however, have in general agreed to confine these distinctions to points of spiritual doctrine.

THE *Mussulmans* who assume to themselves the distinction of *orthodox**, are such as maintain the most obvious interpretation of the KORAN, and the obligatory force of the traditions, in opposition to the innovations of the sectaries: whence they are termed *Soonis*, or traditionists.—Although differing considerably in their legal conclusions, and in the application of the KORAN and the SONNA to *temporal* matters, yet they unite in rejecting the speculations of the scholastic divines;—and some of them condemn the use of scholastic divinity altogether, as tending to destroy the foundations of religious belief.—Concerning these we shall be somewhat more particular, as their discussions occupy a considerable part of this work, and it is their opinion alone which is admitted to have any weight in the determinations of jurisprudence.

THE orthodox sects are four in number—the *Haneefites*, the *Målekites*, the *Shafëites*, and the *Hanbalites*—who are all *Soonis*, or traditionists. But although they equally assume the name of *traditionists*, they do not all equally adhere to the *Sonna*; for there is this characteristic distinction among them, that the first, in determining upon cases where the KORAN affords them no positive precept, are guided principally by their own judgment, examining and deciding, in most of these instances, according to the rules of practical divinity; whereas the three others adhere more tenaciously to the precedents left them by the Prophet. On this account the *Haneefites* are by some writers, for distinction sake, termed *Ahl Keeas*, or the *followers of reason*, and the others *Ahl Sonna*, or the *followers of tradition*.

* The word *orthodox*, as here used, is confined purely to a justness of thinking in *spiritual* matters, concerning which the opinions of those four sects perfectly coincide, the differences among them relating solely to their expositions of the *temporal* LAW.

THE founder of the first sect was *Imám* ABOO HANEEFA NAOMAN BIN SABIT, who was born at KOOFA, the ancient capital of IRAK, A. H. 80, A. C. 702, at which time four of the Prophet's companions were still alive *, from whom, however, it is related, that he never received any instructions or traditional knowledge.

HANEEFA is considered, by the MOHAMMEDANS, as the great oracle of jurisprudence, he being the first among them who attempted to argue abstractedly upon points of LAW, and to apply the reason of men to the investigation of temporal concerns.—They are accordingly lavish in his praise. They even trace the origin of his eminence to a period antecedent to his birth, and suppose him to have been assisted by the peculiar favour and influence of Heaven; for it is related by the learned INAYET-IBN HAMED, that his father, when yet a child, being presented to ALEE, received his blessing, the Commander of the Faithful at the same time declaring, that “from his body should spring a light, which should diffuse its rays throughout all the regions of ISLAMISM.”—However well or ill founded this anecdote may be, his early youth is said to have been marked by a strong predilection for study, an uncommon acuteness of understanding, and an unremitting but cheerful piety, equally removed from the gloomy austerity of the bigot, and the frigid indifference of the sensualist.—HANEEFA was educated in the tenets of the *Shiyas*. He received his first instructions in jurisprudence at *Bagdad*, from *Imám* ABOO JAFIR, an eminent doctor of that sect, and heard traditions chiefly from ABDOOLA IBN AL MOBARICK, both of whose authorities he frequently quotes.—After having finished his studies, and gained considerable reputation at *Bagdad*, he returned to *Koofa*, and there distinguished himself by seceding from his master ABOO JAFIR, and teaching civil law on principles repugnant to those inculcated by that doctor. His defection indeed is, by the *Shiyas*, attributed to motives which, if true, divest

* *Viz.* ANS IBN MALIK, of *Basra*; ABDOOLA IBN AOFA, who lived in *Koofa*; SIHL IBN SAAD, residing in *Madina*; and Aboo YOOFIL IBN-WASILA, who resided in *Mecca*.

him of the merit of proceeding in this upon internal conviction. They relate that ABOO JAFIR's eminent piety, learning, and austerity of manners, having attached to him a considerable number of followers, the increase of his reputation alarmed the reigning *Khàlif*, who, in order to destroy his credit, gained over HANEEFA, by promising to support, with all the influence of government, his opinions and decisions against those of JAFIR; and that HANEEFA, allured by the offer, quitted his preceptor, and instituted a school in opposition to him. Whether they be correct in this statement or not, it is certain that the dissension which took place between these eminent lawyers is considered as the origin of the different tenets of the *Shi'as* and *Soonis* in jurisprudence; and as the habits of mind most early acquired are seldom to be entirely subdued, the little attention which (comparatively with the other *Soonis*) HANEEFA pays to the precepts of the *oral law* may perhaps be attributed to the instructions which in his youth he imbibed from ABOO JAFIR.—He is described of a middling stature, a comely countenance, and pleasant conversation; harmonious in his voice, of an open and ingenuous disposition, and kind to excess to his relations and friends, admitting none to his society but of the best character. Such a disposition and conduct necessarily secured to him the universal esteem, whilst his polemical abilities gained him the reverence and admiration of his disciples; as may be collected from an anecdote which is recorded by SHAFEI, in the introduction to his *Osool*, where he relates that, inquiring of MALIK, “Whether he “had ever seen HANEEFA?” he was answered by that doctor, “Yes; “and he is such a person that if he were to assert a wooden pillar “was made of gold, he would prove it to you by argument.”—*Shafei* himself, although differing materially from him in his legal decisions, says, in another part of the same work, that “No study whatever “could enable any man to rival HANEEFA in the knowledge of the “law.”—It appears, indeed, from the best authorities, that he was a man eminently endowed with science, both speculative and practical; of a mild disposition and tolerating principles; pious, abstinent, charitable,

ritable, and accomplished beyond all others in legal knowledge.—His diffidence is said to have increased with the extent of his acquirements; and he has indeed afforded an instance of insurmountable and scrupulous modesty, such as has been seldom recorded, but which twice exposed him to the most severe treatment from his superiors, and probably, in the end, shortened his life. It is related that HOOBEYRA, the governor of *Koofa*, importuned him to accept the office of *Kàzee* or judge, and, upon his persisting in refusing it, caused him to be scourged for ten days successively, with ten stripes a day, until at length, being convinced of his inflexibility, he released him: and, some years after, the *Khàlif al Mansoor*, having invited him to *Bagdad*, tried to prevail on him to accept the same office, which declining as before, he was thrown into prison, and there confined until he died, A. H. 150.—He wrote several treatises both of a civil and religious nature.—The principal of his speculative works are, I. the *Mâfnad*, meaning the support, prop, or pillar, in which are established all the essential points of *Islamism*, on the authority of the KORAN and the traditions: II. the *Filk-al-èlm*, or orbit of science, a treatise on scholastic theology, in which he exposes the various errors and contradictions of the heterodox; and, III. *Moðllim*, or the teacher, a sort of catechism, shewing the superior excellence and efficacy of FAITH. His principal scholars were *Imâm* ABOO YOOSAF, and *Imâm* MOHAMMED, of whom we shall presently have occasion to speak more particularly.—The sect of HANEEFA at first prevailed chiefly in *Irâk*; but his doctrines afterwards spread into *Assyria*, *Africa*, and *Transoxania*; and his authority with respect to jurisprudence is at present generally received throughout *Turkey*, *Tartary*, and *Hindostan*.

THE founder of the second orthodox sect was *Imâm* ABOO ABDoola MALIK BIN ANS, who was born at Medina, A. H. 94, A. C. 716.—Living in the same place with, and receiving his earliest impressions from SIHL IBN SAAD, the almost sole surviving COMPANION of MOHAMMED, an ear witness of his precepts, and a participator in his dangers and exploits, MALIK acquired the utmost veneration for the traditions, to which he afterwards paid an implicit regard through life.—He was indeed considered

dered as the most learned man of his time in that species of knowledge, and exerted his utmost endeavours to procure reverence and respect to those posthumous precepts of the PROPHEt.—His self denial and abstinence were remarkable, inasmuch that he generally fasted four days in the week, during which he denied himself even the most ordinary indulgencies.—He enjoyed the advantages of a personal acquaintance and familiar intercourse with HANEEFA, although differing from him with respect to the absolute authority of the traditions.—His pride, however, was at least equal to his literary endowments.—In proof of this it is related of him that when the great *Khàlif* HAROON AL RASHEED came to *Medina*, to visit the tomb of the PROPHEt, MALIK having gone forth to meet him, the *Khàlif* addressed him, “O MALIK! I intreat, as a favour, that you will “ come every day to me and my two sons AMEEN and MAIMOON, and “ instruct us in traditional knowledge;” to which the sage haughtily replied, “O KHALIF! science is of a dignified nature, and instead of “ going to any person, requires that all should come to it.”—The story further says that the sovereign, with much humility, asked his pardon, acknowledged the truth of his remark, and sent both his sons to MALIK, who seated them among his other scholars without any distinction.—With regard to the *traditions*, his authority is generally quoted as decisive.—In fact, he considered those as altogether superseding the judgment of a MAN; and on his deathbed severely condemned himself for the many decisions he had presumed to give on the mere suggestion of his own reason.—The KORAN and the SONNA excepted, the only study to which he applied himself, in his latter days, was the contemplation of the DEITY; and his mind was at length so much absorbed in the immensity of the divine attributes and perfections, as to lose sight of all more insignificant Objects!—Hence he gradually withdrew himself from the world, became indifferent to its concerns, and after some years of complete retirement, died at *Medina*, A. H. 179, A. C. 801.—His authority is at present chiefly received in *Barbary*, and the other northern states of *Africa*.—Of his works, the only one upon record is the *Mattâ*, which contains a review of the most remarkable adjudications of the *Prophet*.—His principal
scholars

scholars were SHAFEI (who afterwards himself gave the name to a sect), ABOO LAIS, and the learned IBN SIREEH.

THE founder of the third orthodox sect was *Imâm* MOHAMMED IBN EDREES AL SHAFEI, who was born at *Askalon* in *Palestine*, A. H. 150, A. C. 772.—He was of the same stock with MOHAMMED, and is distinguished by the appellation of *Imâm al Motlebi*, or *Koreish Motlebi*, because of his descent from the Prophet's grandfather ABDAL MOTLEB.—He derived his patronymick title, or surname, SHAFEI, from his great grandfather SHAFEI IBN SAHIB.—His family were at first among the most inveterate of *Mohammed's* enemies, and his father, carrying the standard of the tribe of HASHIM, at the battle of *Beder*, was taken prisoner by the *Mussulmans*, but released on ransom, and afterwards became a convert to the faith.—SHAFEI is reported, by the *Mussulman* writers, to be the most accurate of all the traditionists; and if their accounts be well founded, nature had indeed endowed him with extraordinary talents for excelling in that species of literature.—It is said, that at seven years of age he had got the whole KORAN by rote: at ten he had committed to memory the MATTÂ of *Malik*; and at fifteen he obtained from the college of *Mecca* the degree of a MOOFTEE, which gave him the privilege of passing decisions on the most difficult cases.—He passed the earlier part of his life at *Gàza* in *Palestine*, (which has occasioned many to think he was born in that place,) there completed his education, afterwards removed to *Mecca*, and came to *Bagdad*, A. H. 195, where he gave lectures on the traditions, and composed his first work, entitled the *Osool*.—From *Bagdad* he went on a pilgrimage to *Mecca*, and thence afterwards passed into *Egypt*, where he met with MALIK.—It does not appear that he ever returned from that country, but spent the remainder of his life there, dividing his time between the exercises of religion, the instruction of the ignorant, and the composition of his latter works. He died at *Cairo*, A. H. 204, A. C. 826. Although he was forty-seven years of age before he began to publish, and died at fifty-four, his works are more voluminous than those of any other *Mussulman* doctor.—He was a great enemy to the scholastick divines, and most of his productions (especially upon *theo-*

logy) were written with a view to expose their absurdities, and explode their doctrines.—He is said to have been the first who reduced the science of jurisprudence into a regular system, and made a discriminatory collection of traditions.—AHMED HANBAL remarks that, “until the time of SHAFEI, men did not know how to distinguish between the traditions that were in force and those that were cancelled.”—His first work was (as before mentioned) the *Osool*, or *fundamentals*, containing all the principles of the *Mussulman* civil and canon law.—His next literary productions were the *Sonnàn* and the *Mefned*, both treatises on the traditional law, which are held in high estimation among the orthodox.—His works upon practical divinity are various; and those upon theology consist of fourteen volumes.—His tomb is still to be seen at *Cairo*, where the famous SELAH-AD-DEEN* afterwards (A. H. 587) founded a college for the preservation of his works and the propagation of his doctrines.—The magnificent mosque and college at *Herat* in *Khorasan* were also founded for the same purpose, by the Sultan GHEEAS AD DEEN, at the instance of the *Shafeïtes*, who at one time were very numerous in the northern provinces of *Persia*.—The sect is at present chiefly confined to *Egypt* and *Arabia*; and however highly they may deem of his authority, it will appear in the course of the present work that his decisions in civil and criminal jurisprudence are seldom quoted by the doctors of *Persia* or *India* but with a view to be refuted or rejected.—He first studied jurisprudence under the learned MOOSLIM BIN KHALID, head *Mooftee* of *Mecca*, and accomplished himself in the knowledge of traditions from MALIK in *Egypt*.—His principal scholars were HANBAL and ZOHARI, the former of whom afterwards gave his name to a sect.—SHAFEI is said to have been a person of acute discernment and agreeable conversation.—His reverence for God was such, that he never was heard to mention his name except

* *Yoozaf Bin Ayoob*, entitled *Selah-ad-deen* (the guard of religion) a native of *Curdistan*, who rose to empire, and is well known in the history of the *Crusades*, by the name of SALADIN.—He was a great admirer of *Shafeï*, and a strict follower of his rigid discipline.—He is therefore represented as an inveterate enemy to all speculations not connected with the KORAN or the traditions; and he is reported to have put to death several who presumed to broach opinions which were not strictly *orthodox*.

in prayer.—His manners were mild and ingratiating, and he reprobated all unnecessary moroseness or severity in a teacher, it being a saying of his, that “ whoever advised his brother tenderly, and in private, did him “ a service; but that public reproof could only operate as a reproach.”

THE founder of the fourth orthodox sect is *Imám* ABOO ABDOOLA-AHMED IBN HANBAL, surnamed *Shabán al Maroozee* *. He was born at *Bagdad*, A. H. 164, (A. C. 786,) where he received his education under YEZEED BIN-HAROON and YEHEEYA BIN SEYID.—On SHAFEI coming to *Bagdad*, (A. H. 195,) IBN HANBAL attended the lectures delivered there by that doctor, and was instructed by him in the traditions. In process of time he acquired a high reputation from his profound knowledge of both the civil and spiritual law, and particularly for the extent of his erudition with respect to the precepts of the PROPHEt, of which it is said that he could repeat above a million. His fame began to spread just at the time when the disputes ran highest concerning the nature of the KORAN, which some held to have existed from eternity, whilst others maintained it to be created. Unfortunately for IBN HANBAL, the *Khàlif* MOTASIM was of the latter opinion, to which this doctor refusing to subscribe, he was imprisoned and severely scourged by the *Khàlif*'s order. For this hard usage, indeed, he afterwards received some satisfaction from MOOTWAKKIL, the son of MOTASIM, who, upon succeeding to the *Khàlif*at, issued a decree of general toleration, leaving every person at liberty to judge for himself upon this point. This tolerant *Khàlif* set the persecuted doctor at liberty, receiving him at his court with the most honourable marks of distinction, and offering him a compensatory present of 1000 pieces of gold, which, however, he refused to accept.—After having attained the rank of a *Mooktiddee* † and *Peishwa* ‡, he retired from the world, and led a recluse life for several years. He

* Meaning probably *Shepherd of the MAROOZIANS*, (a name by which the people of a particular region in *Persia* are distinguished).

† A particular rank among the learned. Literally “an *exemplar*.”

‡ The title bestowed, in *Persia*, upon the leader of a sect.

died A. H. 241, A. C. 863, aged 77.—He obtained so high a reputation for sanctity, that his funeral was attended by a train of 800,000 men and 60,000 women; and it is asserted as a kind of miracle, that on the day of his decease no fewer than 20,000 *Jews* and *Christians* embraced the faith.—For about a century after his death, the sect of HANBAL were numerous and even powerful, and uniting to their zeal a large proportion of fanaticism, became at length so turbulent and troublesome as to require the strong arm of government to keep them in order.—Like most other fanatical sects, they dwindled away in process of time, and are now to be met with only in a few parts of *Arabia*. Although orthodox in their other tenets, there was one point on which they differed from the rest of the *Mussulmans*; for they asserted that God had actually set MOHAMMED upon his throne, and constituted him his substitute in the government of the universe; an assertion which was regarded with horror, as an impious blasphemy, and which brought them into great disrepute.—This, however, did not happen until many years after IBN HANBAL's decease, and is in no degree attributed to him. He published only two works of note, one intitled the *Mosannid*, which is said to contain above 30,000 traditions, selected from 750,000; and another, a collection of apothegms, or proverbs, containing many admirable precepts upon the government of the passions.—He had several eminent scholars, particularly ISMAEL BO-KHAREE, and MOOSLIM IBN DAOOD. His authority is but seldom quoted by any of the modern commentators on jurisprudence.

FROM the disciples and followers of these four great leaders have proceeded an immense number of commentaries at different times, some treating of the civil, some of the canon, law; some comprehending the applications both of the KORAN and the SONNA, others confined solely to the former, and others, again, treating purely of the *traditions*; but all differing on a variety of points in their constructions, although coinciding in their general principles.

THE *Mussulman* courts of justice, when not actuated by any undue influence, in deciding upon causes consult, first the KORAN, then the traditions.

traditions preserved in those collections, which are generally admitted to be authentic, and, next to those, the opinions of their most approved civilians. The two former lay down the principles, and the commentators give the application. Without these last indeed, the presiding magistrates must be often at a loss, or must depend solely on their own judgment; as it is impossible, in the infinite variety of human affairs, that the text of the KORAN, or the traditionary precepts of the Prophet, should extend to every particular case, or strictly suit all possible emergencies. Hence the necessity of *Mooftees*, whose particular office it is to expound the law and apply it to cases. The *uncertainty* of this science, in its judicial operation, is unhappily proverbial in all countries. In some, which enjoy the advantage of an established legislature, competent at all times to alter or amend, to make or to revoke laws, as the change of manners may require, or incidental occurrences render necessary, this uncertainty arises pretty much from the unavoidable mutability in the principles of decision.—Of the *Mussulman* code, on the contrary, the principles are fixed; and being intimately and inseparably blended with the religion of the people, must remain so, as long as they shall endure. Here, of course, the uncertainty is owing solely to the application of the principle, which will necessarily vary according to the different tenets or judgment of the expositors. In the *Mussulman* courts, therefore, the works of their great commentators are particularly necessary, both in order to give a surer stability to property, and also, that the magistrate may avail himself, in his decisions, of the collected wisdom of ages.

THE expositions of the *Mussulman* law are, in general, of three descriptions; the first termed *Osool*, treating of the fundamental principles of the law in matters both spiritual and temporal, as derived from the KORAN,—the second *Sonnàn*, treating of the traditions, and of the rules and precepts of jurisprudence with respect to points not touched upon in the KORAN,—and the third *Fatàvee*, consisting simply of a recital of decisions upon cases. Under these, and a variety of other appellations, some thousands of volumes have appeared at different times. Their authority is of weight according to the supposed merit of the work, or the rank

rank and character of the author. Each, however, has its peculiar characteristic, being (generally speaking) confined to some one branch of jurisprudence, or receiving, in its conclusions, an unavoidable tinge from the particular tenets under the influence of which it was composed.

To attempt a distinct analysis of the various interpretations contained in the comments of even the *orthodox* writers, would require more time and labour than the Translator has at present an opportunity of bestowing on it. He has indeed to lament that the short sketch here exhibited, of the grounds and principles of *Mohammedan* jurisprudence, is so inadequate to the usefulness and curiosity of the subject: but, diffident of his own abilities, and indifferently supplied with the materials which might enable him to do it justice, he thinks it better (for the present at least) to wave entering upon a task in which to *fail* would be less excusable than to be *silent*. Having therefore endeavoured, as far as the narrow bounds of a prefatory essay would admit, to explain, I. the foundations of the *Mussulman* law, II. the origin of those varieties which at present appear in the exposition of it, and III. the use of commentaries to direct the practice,—it is fit that he proceed to give some account of the *HEDAYA*,—an account, to which the preceding detail was a necessary introduction.

AL HEDAYA literally signifies *the guide*. There are many *Arabic* works on philosophical and theological subjects which bear this name. The present, intitled *HEDAYA FIL FOROO*, or the *guide in particular points**, was composed by *Sheikh BURHAN-AD-DEEN ALEE*, who was born at *Marghindan*, a city of *Maveralne'r*, (the ancient *Transoxania*) about A. H. 530, (A. C. 1152,) and died A. H. 591. As a lawyer, his reputation was beyond that of all his contemporaries. He produced several works upon jurisprudence, which are all considered as of unquestionable authority.—According to the account which he himself gives us in his exordium, the *HEDAYA* is a *Sharb* or exposition of a work previously

* *FOROO* literally means *the branches of a tree*, and is here opposed to *Osool*, signifying the *roots*, i. e. the *fundamental principles*.

composed by him, intitled the *Badàyat al Moobtidda*, an introduction to the study of the law, written for the use of his scholars, in a style exceedingly close and obscure, and which (it would appear) required an illustrative comment to enable them to comprehend it.—Of the *Badàyat al Moobtidda*, the translator has not been able to procure any copy. It is, indeed, most probably no longer extant, as the present more perspicuous paraphrase superseded the necessity of the text, and rendered it useless.

THE *HEDAYA* is an extract from a number of the most approved works of the early writers on jurisprudence, digested into something like the form of a regular treatise, although, in point of arrangement, it is rather desultory. It possesses the singular advantage of combining, with the authorities, the different opinions and explications of the principal commentators on all disputed points, together with the reasons for preferring any one adjudication in particular; by which means the principles of the law are fully disclosed, and we have not only the *dictum*, but also the most ample explanation of it. The author, being a *Moojtàhid*, was himself qualified to pass decisions upon cases (whether real or supposed) which should operate as a precedent with others. He of consequence, in many instances, gives us merely *his own* opinion, without resorting to any other authority or precedent. In his comments he generally leans to the doctrine of *Haneefa*, or his principal disciples; and indeed his work may in a great measure be considered as an abstract of the *Haneefite* opinions, modified by those of the more recent teachers, and adapted to the practice and manners of other countries and of later times.

THE persons whose opinions are chiefly quoted by him, besides the four great LEADERS already mentioned, are ABOO YOOSAF, MOHAMMED, and ZIFFER.

IMÂM ABOO YOOSAF, (also known by the appellation of YACOOB-BIN-IBRAHEEM,) was born at *Bagdad*, A. H. 113. He studied under *Haneefa*, and was appointed to the office of *Kázee* of *Bagdad* by HADEE, the fourth of the *Abbassian Khàlifs*. He was afterwards advanced, by the
successor

successor of HADEE, the famous HAROON AL RASHEED, to the dignity of *Kázee al Kazàt* *, or supreme civil magistrate, being the first who ever filled that important station. To him was in a great measure owing the introduction of regular forms into the administration of justice. Before his time the appellations of *Kázee* and *Mooftee* were little used, or indiscriminately bestowed, upon all whose knowledge or abilities enabled them to pronounce the law, or determine upon cases; all matters of dispute being decided among the *Arabs* in a summary way, by appeal to the chief of the tribe, or to the *Imâm* of the city or district. At his recommendation courts of judicature were instituted for the sole purpose of hearing and determining causes, he himself presiding in the principal or supreme tribunal, which was established in the city of the *Khàlif*, and to which all others were subordinate. A particular dress was also appointed for the doctors of the law, together with other *insignia*, calculated to add an exterior dignity and importance to the juridical profession. Though he differs, in a variety of his decisions, from his great master HANEEFA, yet he generally professed to be guided by his opinion, and brought his doctrines much into esteem in *Iràk* and *Persia*.—He not only acquired a high degree of fame by his legal knowledge, but also employed it most successfully in the advancement of his temporal interest, amassing, in the space of a few years, a very considerable fortune.—He is reported to have been a person of great acuteness, ready wit, and prompt in expedients, of which a remarkable instance is recorded in the *Negàristan*, whereby he obtained, in one night, fees to the amount of 50,000 gold *deenars* †. He died at *Bagdad*, A. H. 182.

IMÂM ABOO ABDOOLA MOHAMMED BIN HOOSAIN *al Sheibànee* (commonly called *Imâm MOHAMMED*) was born at *Wàsit*, a city of *Ara-*

* Literally, "*Judge of Judges*." The office was somewhat analogous to that of a *High Chancellor* or *Chief Justice*.

† See Introduction to Richardson's Dictionary, vol. I. p. xlvi. The value of the *Deenar* is so very indefinite, (being estimated, in different countries, at various rates, from 7 s. to 9 s. 6 d.) that it is impossible to state the sterling amount of the sum here mentioned with precision.—It is from 18 to 25,000 l.

bian Iràk, A. H. 132. He studied under HANEEFA, along with ABOO YOOSAF, and afterwards superintended an academy or college in *Bagdad*. He acquired much fame by his extensive and accurate knowledge of the traditions; and was deputed, by the *Khàlif* HAROON AL RASHEED, to superintend the administration of justice in the province of *Khorasan*. He was not more eager in his thirst after knowledge, than liberal in the encouragement and support of it, having spent a large patrimonial fortune in the pursuit of science, and in rewards to its professors.—He spent three years of his youth under the tuition of MALIK; and to the tincture he received from that doctor it is perhaps owing that he not only frequently dissents from the opinions of his chief preceptor HANEEFA, but also, in some instances, from those of his fellow pupil ABOO YOOSAF.—*Shafeï*, in his *Osool*, mentions him with much respect.—He died at *Rai*, the capital of *Khorasan*, (where his monument is still to be seen,) A. H. 179.

ABOO *al* HAZL ZIFFER BIN HAZL was a contemporary and intimate companion of HANEEFA, and one of the most austere persons of that sect.—We have not been able to collect any other particulars concerning the character of this doctor, further than the remarkable retention of his memory, which particularly qualified him for excelling in traditional knowledge. He was appointed chief judge and governor of *Basra*, at which place he died, A. H. 158.

THE books principally cited in the *Hedàya* are the *Mabsoot*, the *Jama Sagbeer*, the *Jama Kabeer*, the *Zeeadàt*, the *Nawàdir*, and the commentary of *Kadooree*. The *Mabsoot* or *Amplified Digest* (which is also, by way of pre-eminence, entitled the *Ast*, or *root*) was composed by ABOO' L' HASN ALI BIN MOHAMMED, who is intitled *Fakhr-al-Islàm*, or *the glory of the faith*, and surnamed *Bezda'vee*, from the place of his birth, *Bezda*, a fort in *Maveralne'r*.—This great work was published about A. H. 460, and was intitled, by its author, a *Mabsoot*, or *Amplified Digest*, because of its being written in rather a diffusive style, the term literally meaning *spread out*. It consists of eleven volumes, and comprehends a complete course of

theology and practical divinity, treated according to the principles of the *Haneefite* school, of which the author professed himself a follower.—The *Jàma Kabeer*, or *great compilation*, is a collection of traditions on the most approved authorities, (whence this work is also termed *Jàma Sabeeh*, or the *approved compilation*,) composed by YEESOO MOHAMMED BIN YESOO *al Termazi*, about A. H. 260. It is related that the author, before publication, sent copies of his work to all the principal professors in *Arabia* and *Persia*, each of whom expressed his approbation of it in the highest terms. Many other works have been written on the same subject, and under the same title; but this is considered as the most authentic. The *Jàma Sagheer*, or *small compilation*, is also a work upon the same subject, on a more minute scale. The author uncertain.—The *Zeeadàt*, or, as it is more fully intitled, *Zeeadàt fi'l foroo al HANEEFA*, meaning, *Addenda concerning the branches of HANEEFA*, is a copious treatise upon legal conclusions, as taught by that doctor, said to be composed by *Imám MOHAMMED*, under the inspection and with the approbation of his master. This treatise is highly esteemed; and many commentaries have been written upon it, in *Turkey*, *Africa*, *Arabia*, *Persia*, and *India*.—These four works are frequently cited, by the compiler of the *HEDAYA*, under the comprehensive term of *Zàhir al Rawàyat*, or *The letter of Reports**; and his book consists chiefly of a compendious extract from these. The *Na-wàdir*, or *curiosities*, is a title bestowed upon a digest of four other compilations of traditions and law reports. These compilations are not supposed to be possessed of the same authority with the *Zàhir al Rawàyat*, and are therefore, by the commentators, distinguished under the head of *Ghair Zàhir al Rawàyat*†.—The commentary of *Kadooree* (which is sometimes simply termed *Kadooree*) takes its title from the patronymic appellation of the author, AHMED BIN MOHAMMED KADOOREE. It is a com-

* *Zahir* is a term used to express the external matter or *text* of a work, (particularly of the *KORAN*,) in opposition to *Batin*, by which is understood the *internal meaning*.

† *Ghair* signifies “different from,” “other than.” It is generally used in a *privative* sense.

mentary upon a previous work of ABOO YOOSAF, intituled *Adab al Kazee*, or *duties of a magistrate*, and is considered as of high authority by the sect of HANEEFA.—It was published about A. H. 420; the place of its publication uncertain.

A NUMBER of other authorities are quoted in the course of this work. Of several the translator has not been able to procure any authentic account:—but, for the satisfaction of the reader, the following short abstract is given concerning those which appear most worthy of notice.

AMONG the *personal* authorities cited, we find the names of the four first *Khàlifs*, and also of several of the *Sahàbá*, or original companions of the Prophet. Of these last, the most esteemed are ABDOOLA IBN ABBAS, and ABDOOLA IBN MASAOOD.—ABDOOLA IBN ABBAS was the cousin-german of ALEE, and his principal friend and confidant during the struggle between him and MOAVIAH for the *Khalifat*. He died A. H. 65.—ABDOOLA IBN MASAOOD, also known by the name ABOO ABDULRIHMAN ABDOOLA *al Hàzlee*, joined the Prophet almost at the commencement of his pretended mission; led his disciples, in their retreat to *Ethiopia*, upon the persecution of the KOREISH; and afterwards repaired to him at *Medina*. He died A. H. 44, intituled, for his eminent knowledge of the KORAN, and the precepts of the Prophet, *Táj-al-Shirra*, or *the diadem of the law*.—HASSAN, surnamed *Bakhtàree*, was an eminent teacher of the law. He was a native of *Khorasan*, whence he takes his appellation, *Bakter* being the name anciently bestowed on that region, because of its relative situation, as it signifies the *east*,—whence the ancients termed the same territory *Bactriana*.—IBN AL KHASAF, surnamed *Aboo Bekr Ahmed*, was an eminent adherent to the sect of HANEEFA; and wrote a treatise under the same title as that of ABOO YOOSAF, already mentioned, and upon the same subject, (*the duties of a magistrate*,) in which all the doctrines of his leader are exemplified and supported by argument.—ABOO JAFIR *Hindooanee* takes his appellation from the place of his birth, *Hindooan*, a quarter or ward of the city of *Balkh*, the

capital of *Khorasan*. He attained to such eminence in the law, as to be appointed to the dignity of supreme *Mooftee* throughout all the region of *Maveralné'r*, (*Transoxania*;) and by his superior excellence acquired the title of *Haneefa Saneé*, or HANEEFA the *second*.—He died at *Bokhàra*, A. H. 362; and it is said that, on the day of his decease, a multitude of Jews and idolators were converted to the faith, by beholding his piety and abstinence, and the fortitude with which he met his dissolution.—ABOO MOHAMMED AL KASIM (commonly called ABOO *Hareera*) derives his appellation, *Hareera*, from the place of his residence, *Herat*, a city of *Persia*.—He was born at *Basra*, (whence he is also by some termed *al Basreea*,) A. H. 446. He composed, at the instance of ABOO SHERWAN KHALID, the Vizir of the *Seljuician* Sultan MAHMOOD, a work intitled *Makamàt*, (occasionally mentioned in this commentary,) consisting of fifty discourses on various subjects of law and morals. He died A. H. 515.—His authority has great weight in all legal discussions.—The doctor mentioned under the title of *Tehâvee* is ABOO FAKA, *Kâzee* of *Taba*, a town in Upper Egypt.—ABDOOLA BIN MOBÂRICK (commonly styled *Ibn al Mobârick*) was a person of eminent piety, who died at *Heet*, a city of *Irâk*, (*Chaldea*,) where his tomb still continues to be visited by the devout, as the *Mausoleum* of a saint.—TAMEEM BIN TIRFA was one of the *Sahâbâ*, or companions of the Prophet, of whom many fabulous miracles are recorded.

AMONG the books quoted, besides what have been already mentioned, are the following:—

THE *Rawâyat Saheeh*, or *indubitable reports*; a title bestowed upon two different treatises on the *Sonna*; the first, by ABOO ABDOOLA MOHAMMED BIN ISMAEL *al Joofi*, on which a number of comments have been written at different times; and the second, by ZÂK-AD-DEEN *al MANDREE*. They are both considered as of good authority.—The *Rawâyat Mash'boor* (celebrated reports) *Hadees Mash'boor*, (celebrated traditions,) *Nakl Saheeh*, (true relations,) and *Moontakkee*, (selections,) are also approved works by different

ferent uncertain authors on the same subject. The *Amàlee* (miscellany) is a general commentary upon the law, attributed, by some, to MOHAMMED BIN MOSLEM *al Zohàri*, who is said to have been the first compiler of traditions, and the preceptor of *Imâm MALIK* BIN ANS, the head of the second orthodox sect, already mentioned.—The *Fatàvee* SHAFEI, *Fatàvee* KÂZEE KHAN, *Fatàvee* TIMOOR-TASHEE, and *Fatàvee* *Imâm* SIR-RUCKHSH, are all collections of the decisions passed by the persons whose names they bear, or upon their authority, and have been compiled with a view to serve as precedents in practice. SHAFEI has already been mentioned as the head of the third orthodox sect. KÂZEE KHAN was the distinguishing appellation of FAKHR-AD-'DEEN HASAN BIN MANSOOR, a native of *Arnoos*, (*Albania*,) who for some years superintended the administration of justice in *Damascus*, and afterwards at *Isfahàn*. He died A. H. 592.—Of the other two nothing particular is recorded. They were probably magistrates in some part of *Persia*.

FROM a consideration of the nature of this work, and of the authorities principally quoted in it, we proceed to notice certain peculiarities which will occur in the perusal of it, and an explanation of which is requisite to the elucidation of what might otherwise appear unintelligible or obscure.

ALL laws must derive the prominent features of their character from the peculiar manners, customs, and language, of the people among whom they have originated.—In order, therefore, to enter fully into the spirit of the text, it is requisite that we keep in mind the state of society in *Arabia* at the time when MOHAMMED and his companions began to introduce something like a system of jurisprudence among the followers and subjects of *Islâm*. To enter into this particularly would be much beyond the Translator's design, and would occupy more room than a mere preface can admit of. It is sufficient for our purpose to remark, that the *Arabians* were divided into two classes or descriptions of men, the inhabitants of cities, and the *Bidweens*, or wanderers in the desert. The former
pursued

purſued commerce and huſbandry; whiſt the latter (that is, the great body of the nation,) followed the uſual occupations of the paſtoral life, occaſionally made inroads upon their more wealthy neighbours, attacked the caravan, and plundered the traveller.—In this general outline time has produced but little alteration.—Subdued by the arms, or allured by the promiſes, of the PROPHEt, the tribes of the deſert united their forces, and, iſſuing from their native wilds, over-run the neighbouring nations with an impetuofity of valour which nothing could reſiſt, and with an uninterrupted uniformity of ſucceſs to which hiſtory oppoſes no parallel. This, however, was only an extraordinary convulſion, proceeding from the coincidence of accidental cauſes, placing them in a ſituation which ſubſequent events have evinced was by no means natural. As the firſt impreſſions of fanatic zeal abated, they recovered from their dream of univerſal conqueſt; and, after having altered the religion of a large portion of mankind, overturned the moſt powerful monarchies, and eſta bliſhed various royal dynaſties in the ſurrounding countries, ſucceeding revolutions gave back the *Bidweens* to their original independence and their original ſolitude. In the mean while, the excluſion of ſtrangers or unbelievers from their principal cities in a great meaſure prevented the more poliſhed from mixing with the reſt of mankind, from being contaminated with their vices, or improved by their example. Hence, except in the ſingle article of religious belief, the *Arabs* perhaps differ little at this day from what they were two thouſand years ago, and indeed preſent to us almoſt the ſame picture in point of genius, temper, and manners, as in the time of the *Jewiſh* patriarchs.

WHEN MOHAMMED aſſumed the prophetic character, he found his countrymen, in general, ſlaves to the moſt groſs and ſtupid idolatry. The paganiſm of the *Sabians* had over-run almoſt the whole nation.—From *Persia* the eaſtern tribes had caught much of the ſuperſtition of the *Magians*.—There were, indeed, numbers of *Jews* and *Chriſtians*. The former had ſeveral conſiderable eſta bliſhments; and many whole tribes had embraced the *Mofaic* creed or the *Gospel*. But their conduct and principles

ciples little deserved the titles they assumed. The *Jews* paid more regard to the fabulous traditions of their *Rabbins* than to the severe and unaccommodating precepts of the *Pentateuch*; and the eastern churches were divided and convulsed by scholastic disputes, in which, instead of the mild and forbearing spirit of Christianity, nothing but mutual rancour, malice, and uncharitableness, prevailed; whilst the pure and simple worship inculcated by its divine Author had degenerated into mere outward shew, expressive only of a debasing and idolatrous superstition.—Among the pagan *Arabs*, the nice distinctions of property were imperfectly understood. Each tribe was governed by its own law; and disputed causes were either referred to the determination of the chief, or (more frequently) decided by an appeal to the sword. Their only lasting memorials were the effusions of their poets, transmitted orally from age to age, which served to preserve ancient usages, or to keep alive the feuds of contending neighbours. Private revenge was not merely tolerated, but encouraged, and the justice and necessity of it inculcated. Hence every dissension was the occasion either of single combat or of civil war; and tradition furnishes us with accounts of above 1500 battles fought before the introduction of the faith.—The art of writing was little known, and the practice of it confined chiefly to the *Jews* and *Christians*. These were distinguished by the common appellation of KITÂBEES, (*scripturists*,) or AHL al KITÂB, (*people of the book*,) because of each having received a written revelation from Heaven.—The accomplishment principally esteemed among the *Arabs* was expertness at weapons and in horsemanship. The sciences mostly studied were, genealogy, astronomy, and rhetoric. The first of these was carefully employed in preserving the purity of their descent; the second was applied chiefly to astrological purposes; and the third they exercised in the composition of love-songs and elegies, or poetic fictions concerning the exploits of their chiefs, the relation of which cheered the aged, and animated the young. Their great virtues were, hospitality, temperance, and munificence, which last was frequently carried to an unwarrantable and (perhaps) ostentatious excess, to the prejudice of their children and kindred.—Their most odious vices were a dis-
position

position to war and rapine, and an unappeasable vindictiveness of spirit. Their seclusion from the rest of mankind taught them to consider every strange nation in an hostile light; and the term *Hirbee* expressed, at once, an *alien* and an *enemy*.

THIS short and imperfect sketch will serve to familiarize or explain to us a number of extraordinary passages in the following treatise. In fact, without some such reference, several of the examples adduced in the course of it must appear unnatural or improbable, and the arguments upon them frivolous or absurd. In too many instances they certainly are so; the *Mussulman* lawyers being as much addicted to verbose sophistry as any of their *Christian* brethren. But a due regard to local circumstances will teach us to consider, that numbers of the cases here cited in elucidation of particular points of law, although they may seem to an *European* to be such as can seldom or never really happen, would yet appear, to a *Mussulman*, to contain no more than a necessary provision with respect to cases of frequent or probable occurrence. Many of them, indeed, seem to be proposed merely as exercises for the exertion of mental acumen, and the display of subtle distinctions; and as such they are perhaps not without their use. With respect to the *argumentative* part in particular, although abounding in futile sophistry, still it possesses the advantage of leading to a full development of the *principles*. It moreover places subjects in every possible light, familiarizes us to the modes of reasoning in use among the *Mussulman* professors, (a matter of some literary curiosity,) and frequently involves material points of law, not to be found under the heads to which they properly relate *.

THE first singularity likely to strike the *European* reader, on casting his eye over those laws, is the great proportion of them which relates to slaves, the discussions concerning whom occupy nearly a third of the whole work. To account for this, it is proper to remark that, among

* See an instance of this in Vol I. p. 8. article ZAKAT; where an opinion of *Haneefa* is introduced with respect to a *Kazee's* declaration of a debtor's insolvency.

the first votaries of *Islâm*, whose ideas of luxury extended not beyond the plain simplicity of the pastoral life, the articles of property were few, and confined, for the most part, to slaves and domestic animals. The former generally constituted their chief substance; and *the bodies of bondmen* have in those countries formed, from the earliest ages, a principal commodity of traffic.—The *Arabs*, like most other barbarous nations, had ever been in the practice of retaining as slaves all the captives taken in war, whose lives were spared by avarice or policy. The children of those captives partook of the condition of their parents.—The fanatic fury of the *Sabâbâ*, (companions,) under the prophetic banner, in the beginning of their career, spared neither age, sex, or condition; but, when the first ebullitions of zeal subsided, their prisoners were reserved as a valuable part of plunder.—Every new conquest poured into *Arabia* a fresh accession of captives; and those formed, in time, not only a great part of the wealth of individuals, but also a principal proportion of the community. Hence the considerable space which the laws concerning SLAVES occupy.—In numberless instances, however, the cases and examples cited with respect to them are not exclusively restrictive to SLAVES, but may be considered in the light of so many legal *paradigms*, equally applicable, in their construction, to any other articles of commerce or exchange.

THUS far the translator deemed it requisite to premise of the work in general.—He is now arrived at a less agreeable part of his present duty, since indispensably productive of a degree of *egotism*,—it being necessary to add a few pages concerning the *Persian version* of the *HEDAYA*, and the *English translation* of that version.

WHEN the attention of the *British* government in BENGAL was first directed to the necessity and importance of procuring some authentic guide for aiding them in their superintendence over the native judicature, (founded on the reasons we have already stated,) they discovered, in the

books recommended to forward this end, a system copious without precision, indecisive as a criterion, (because each author differed from or contradicted another,) and too voluminous for the attainment of ordinary study.—From these a compendium might indeed have been abstracted; but, being a mere compilation, it would have been considered rather as a *new code* than as a revision of the *old*, and would not, in the idea of those upon whom it was intended to operate, have borne the authority of an original work. Numbers of *Fattàwees* were indeed at hand, and the translation of one composed in the *Persian* language, by the authority and under the inspection of the *Mogul* Emperor AURUNGZEBE, (from him denominated *Fattàwee Allumgheeree*,) was actually undertaken. It was, however, soon discovered that this, consisting of a simple detail of cases and decisions, would do little or nothing towards developing the *principles* of the *Mussulman* laws, and of course could afford but a very limited portion of instruction with respect to them. Some learned *Mohammedans*, who were consulted on this occasion, thought it, moreover, unfair that their *British* rulers should receive their first impression of the *Mussulman* legislation from a bare recital of *examples*, such as composed the *Fattàwee Allumgheeree*. They therefore advised that, previous to any further step, a translation should be executed of some work which, by comprehending, in the same page, the *dictum* and the principles, might serve at once as an exemplar and an instructor; and for this purpose they recommended the *HEDAYA*, because of its being regarded (particularly throughout *Hindustan*) as of canonical authority, and uniting, in an eminent degree, all the qualities required. But as the *Arabic*, in which this treatise was written, is known only among the learned, and the idiom of the Author is particularly close and obscure, they at the same time proposed that, under the inspection of some of their most intelligent doctors, a complete version should be formed, in the *Persian* language, which would answer the double purpose of clearing up the ambiguities of the text, and (by being introduced into practice) of furnishing the native judges of the courts with a more familiar guide, and a more instructive preceptor, than books written in a language of which few of
them

them have opportunities of attaining a competent knowledge.—In conformity with this advice, four of the principal and most learned *Molovees* (*Mohammedan* lawyers) were engaged to translate the whole from the *Arabic* into the *Persian* idiom.—The translation of this version into *English* was at first committed to Mr. JAMES ANDERSON, a gentleman whose eminent *literary* qualifications for accomplishing such an undertaking could only be excelled by the solidity of his understanding, and the goodness of his heart. Before he had made any considerable progress, the present Translator had the honour of being associated with him in the work; and Mr. ANDERSON being shortly after engaged in an important foreign employment, the duties of which necessarily occupied the whole of his attention, the completion of it devolved entirely on his colleague, who, in consequence, took upon him the sole management and responsibility.

WHEN the *English* translator came to examine his text, and compare it with the original *Arabic*, he found that, except a number of elucidatory interpolations, and much unavoidable amplification of style, it in general exhibited a faithful copy, deviating from the sense in but a very few instances, in some of which the difference may perhaps be justly attributed to the inaccuracy of transcribers *; and in one particular it is avowed and justified by the *Molovees*, because of an alledged error of the author †.—Many of the interpolations are indeed superfluous, and they sometimes exceed, both in length and frequency, what could be wished. They, however, possess the advantage of completely explaining the text, from which every reader may for the most part with ease discriminate them, since they almost uniformly consist of illustrative expositions of passages, beginning with, “that is,”—“in other words,”—and so forth; and where

* See, for instance, vol. II. p. 281; where it is likely that the deviation pointed out in the note may be owing merely to some inaccuracy in the *Persian* copy, as the error is evident.

† See vol. IV. p. 499; where the *Molovees* correct an error with respect to a legatee's proportion in the undefined part of a house.

the composers of the *Persian* version have, in any considerable degree, deviated from their original, the *English* translator has remarked upon it, and has, in several such instances, subjoined a *verbatim* translation from the *Arabic*, in order to point the difference with the greater precision. One deviation, indeed, in point of *form* rather than of *substance*, he has not thought it necessary to notice, as it runs regularly through all the work, and he therefore conceived that a single prefatory explanation of it would suffice for the whole.—In the OBJECTIONS and REPLIES, which so frequently occur, the *Molovees* have observed an arrangement somewhat varying from the original, and which they probably adopted for the sake of greater perspicuity. The *Arabic* text does not state the passages, thus rendered, with the same degree of distinctive precision; but preserving, in those instances, that brevity which is its peculiar characteristic, introduces the matter of them in a way certainly calculated to give less interruption to the general context;—the reasoner upon any disputed point saying, (still pursuing his argument,) “It may indeed be objected,” &c.—“But to this we reply,” &c.—an additional observation, brought forward solely with a view to the more complete illustration of the subject, and which the *Molovees* employed upon the *Persian* version have reduced to the form of an abstract QUESTION and ANSWER.—Another unnoticed deviation is, that where the author speaks *in his own person*, he is, in the *Persian* version, generally mentioned by the style of “the compiler of the *HEDAYA*,”—as thus, “The compiler of the *Hedâya* remarks” &c. The only remaining difference between the *Arabic* text and the *Persian* version of it, worthy of notice, is, that in the latter we have a particular definition of terms, a point in which the original is totally defective, but which is doubtless indispensably requisite to persons not conversant in the *Arabic* tongue;—and they may, perhaps, be moreover considered as affording a valuable addition to *Oriental* lexicographic knowledge, as they give not only the meaning of the term, but also its etymology, and particular application in the language of the LAW.

To the mode of execution the translator is perfectly aware that one objection is likely to occur, which at first may appear of some weight.

It

It may doubtless be urged that, instead of having recourse to an intermediate version, the translation should have been made at once from the *Arabic*, by which means the work would have presented a more close and accurate picture of the original.—Had the translator been at liberty to pursue this plan, much labour would indeed have been saved him! Some reasons are, however, to be assigned, which, when duly considered, will perhaps be found to give an indisputable preference to the mode that has been adopted. I. As the *Persian* version was designed for the use and instruction not merely of the *English* scholar, but also of the native magistrate, and was therefore likely to be introduced into practice, it was indispensably requisite that the *English* translation should be taken from it rather than from the *Arabic*, in order to preserve an exact and literal uniformity between the two standards of judicial determination. II. The *Arabic* is remarkably close in its idiom, and, in treating of every abstracted subject, brief in its construction to a degree which, in any other language, would be considered as involving the matter treated of in the darkest and most perplexing obscurity. This is evident in the continual ellipsis of *terms*, and a consequent repetition of *relatives*, (many frequently occurring in the same period,) which are referable to their proper antecedents only by certain rules of context peculiarly appropriated to that language. Hence a *literal* translation from the *Arabic* would have left the sense, in many places, as completely unintelligible to the *English* reader as the original itself.—In following the *Persian* version, therefore, (if we except the interpolations already mentioned and accounted for,) the translator has done little more than what he must have done, at any rate, to render himself understood,—namely, given the sense in a *fuller* and more *explicit* manner than the original author,—but without in any degree departing from or altering the tenor of the text. III. The persons employed in the composition of the *Persian* version were themselves possessed of deep legal knowledge, qualified, both by their academical rank and judicial stations, to pass decrees, and perhaps as well versed in the *Mussulman* institutes as their author. Hence their interpolations proceed from an authority perfectly competent, and being (as in many instances they certainly are) of essential utility, must be considered as a valuable

valuable addition to the text. These interpolations are, in fact, nothing more than *explanatory remarks*, inserted in the body of the work, instead of being subjoined in the form of notes.—Had the translator conceived himself at liberty to use his own unlimited discretion in the manner of his performance, he could perhaps have adopted this mode, as being more agreeable to the literary fashions of his own country, in all except original compositions. But this is a plan seldom adopted by Oriental writers; and the translator had a particular duty prescribed to him, which (except in some very particular cases) he considered himself bound implicitly to fulfil; for it was his business to give the *Persian* version of the *HEDAYA* an *English* dress both in *order* and in *substance*, since otherwise it would have been impossible to preserve the exact uniformity necessary to authenticate the *English* text in cases of future reference or appeal.

HAVING hazarded thus much in justification of the general plan, it will be proper to point out such particulars in the translation as it is essential to explain, for the information of the European reader.

It is well known that in every language there are certain peculiarities of idiom which do not admit of a very intelligible literal translation into any other.—In every science also (and more, perhaps, in *legal* disquisitions than in any other) there are certain peculiarities of phraseology concordant with the ideas, moral, religious, or political, of those who use them, and also certain allusions, connected with those ideas, or referring to them, which require some illustration in order to their being fully understood by persons not familiarized to the same habits of thinking, or to similar modes of expression.

THE first of these which strikes the reader (and which occurs very frequently) is “*a favourable construction*” (of the *law*, or the *case*,) as opposed to “*analogy*.” The original term *istihfân*, which the translator has rendered “*a favourable construction*,” literally means *benevolence*;

lence; and the expression referred to, as it stands in the original, signifies “*on the ground of BENEVOLENCE*,”—that is, by a mode of arguing, in its conclusion more favourable, either to the individual or the community at large, than could be adduced by reasoning according to the stricter principles of analogy and legal casuistry. It is observable, in the course of the work, that this species of reasoning is frequently adopted by HANEEFA, or his disciples, in opposition to the rigid tenets of the *Shafæite* school. And this difference proceeds from the more liberal complexion of that doctor’s practical divinity, which distinguishes him from the heads of the other orthodox sects, as has been already stated.

IN a work of this nature, an exact uniformity in the translation of technical terms and phrases is not only advisable, but, in general, indispensably requisite. It has, however, sometimes unavoidably happened that a term is differently rendered in different places,—not indeed with respect to the *sense*, but with regard to the *English* term used to express it in. Thus *Maxoon*, (for instance,) which is commonly rendered “*licensed slave*,” is also, in some places, translated “*privileged slave*,” a phrase which equally well expresses the sense of the original term.—Wherever this occurs, a reference is (for the sake of uniformity) made, in the Index, to that term which the translator intends should be considered as the *technical* one.

WITH respect to any remaining peculiarities, technical or idiomatical, not noticed in this place, as they are all fully defined in one part or other of the work, an explanation of them is easily obtained by consulting the INDEX.

IT were to be wished that, in a performance designed for the use and information of European readers, correspondent *English* expressions could have been found for all the various technical terms contained in it. It must doubtless be irksome to meet frequently with words which a reader unlearned in the *Arabic* language finds it difficult to pronounce, and for the meaning of which he is under a necessity of referring to the INDEX,
and

and back from that to the body of the work. This, however, is a difficulty which could not in all cases be remedied. Where the customs of different countries are at all analogous, the language of each will of course contain synonymous terms for expressing the same ideas. Where, on the contrary, customs, laws, or modes of thinking, prevail in one country totally different from any thing to be found in the other, no modes of expression that could be adopted in the language of either would suffice to express, with precision, the meaning of technical or local terms used in the other. This science, moreover, has in every country its peculiar phrases, which will not bear any very intelligible translation, whence the necessity of adopting and retaining them in their original form,—an observation the truth of which may be perceived by casting an eye over any one page in any one of our own law-books. The translator, therefore, has found himself under an unavoidable necessity of occasionally retaining the original terms, without attempting any translation of them,—taking care, at the same time, to refer, in the INDEX, to the definition of them, which is invariably to be found in some part of the work;—making it, however, a general rule to express in *English* every term capable of a technical or intelligible translation.—It is proper to remark that, in the orthography of these *Arabic* terms, there sometimes occurs a slight variation, which in a work of such extent it was not easy always to avoid. Thus, instead of *Tàlbá*, (a man's name,) we have, in one place, *Telliba*; and, in five or six instances, *Deeyat* is used for *Deyit*, (the fine of blood.) Wherever this variation occurs, it is rectified by a reference in the INDEX;—but there are not above three or four instances in which this is necessary. It is also to be observed that, in the use of the *Arabic* personal nouns, attention must be paid to the termination, which in *á* always denotes the feminine gender. Thus *Hirbee* means an alien, *Hirbeeá* an alien woman; *Zimmee* an infidel subject of the *Mussulman* government, and *Zimmeeá* a female infidel subject; and so of the rest, except *Muslimá*, (a female *Mohammedan*,) which is derived from *Moslim*, (a confider, or a person in a state of *salvation*,) a term generally qualified by the characteristic termination in *àn*,—whence *Moslimàn*, or (according to the vulgar orthography) *Mussulman*.

As a GLOSSARY, if confined within any tolerable limits, would very imperfectly express the meaning of the various law-terms and phrases, or, if giving the definition of them, would contain merely a repetition of what is already set forth in the body of the work, the Translator has in this instance hazarded a new mode, by introducing all those terms in a supplementary Index, with a reference to their place in the text. He has also, for the satisfaction of the Orientalist, and in order to remedy the defects of the *European* alphabet, (which, at best, expresses *Arabic* words but very imperfectly,) inserted, in that Index, each term or proper name in its original character.

To promote, as much as possible, the beneficial ends intended by this work, the Translator has in various places added such notes as appeared necessary to clear away ambiguities and obscurities in the text; and he has also annexed a *marginal abstract*, which gives the *substance* of the law, unencumbered by the long details of reasoning which generally accompany it.—To the whole is affixed a copious INDEX, designed to be useful in three respects, by referring, I. to legal conclusions, II. to the general HEADS or SUBJECTS, and, III. to rules which occur (as it were) *incidentally*, involved in the reasonings upon other matter.—As each volume has also prefixed to it a table of contents, the references are so much broken and divided, that the reader can never be at a loss to satisfy himself upon any particular point which duty or curiosity may prompt him to investigate.—It may be proper to remark that the marginal abstract, the notes at bottom, and the Index, form no part of the original work, which has only a general table of contents.

IN one particular, and in one alone, has the translator conceived himself at liberty to desert his text; namely, by a *total omission* of particular passages, for reasons which are assigned in their proper place. These reasons generally are, either that the passage relates solely to certain rules of *Arabic* grammar, which therefore do not admit of an intelligible translation into another language, or contains merely ingenious sophisms, so exceedingly futile as to be of no use.—Of this *last* reason abundance of examples are still retained!—It will, however, in most of these be

found that, amidst the frivolity of the argument, some useful illustration is involved: nor is the translator conscious of having omitted any thing, the retaining of which could, either directly or incidentally, have been attended with advantage.

ANOTHER and more considerable omission it is proper he should account for.

As the HEDAYA includes a complete system of *Mussulman* jurisprudence, it commences with the *Abadât* or *spiritual* law, including the five great religious duties of *purification*, *prayer*, *alms*, *fasting*, and *pilgrimage*.—Of these the book of *ALMS* (*Zakât*) only is retained by the translator, as the others are neither very curious in their nature, nor could afford any manner of assistance in decisions concerning matters of property; and would have burthened the work with an additional and totally useless volume.—This omission has not occasioned any alteration in the consecutive arrangement of the books; but it has necessarily induced a difference in the distribution, among the four volumes, of those which are retained.—In the original the subjects are distributed as follows:—

VOL. I. *Purification. Prayer. Alms. Fasting. Pilgrimage.*

VOL. II. *Marriage. Fosterage. Divorce. Manumission. Vows. Punishments. Larciny. The Institutes. Foundlings. Troves. Fugitive Slaves. Missing Persons. Partnership. Appropriations.*

VOL. III. *Sale. SIRE Sale. Bail. Transfer of Debts. Duties of the KÂZEE. Evidence. Retraction of Evidence. Agency. Claims. Acknowledgments. Compositions. Mozâribat. Deposits. Loans. Gifts. Hire. Mokâtibs. Willa. Compulsion. Inhibition. Licensed Slaves. Usurpation.*

VOL. IV. *Shaffa. Partition. Compacts of Cultivation. Compacts of Gardening. Zabbah. Sacrifices. Abominations. Cultivation of Waste Lands. Prohibited*

Prohibited Liquors. Hunting. Pawns. Offences against the Person. Fines. Levying of Fines. Wills. Hermaphrodites.

IF the reader is not already tired with this introductory detail, the translator would request his indulgence while he adds a short account, apparently necessary, of the books which have been omitted, as well as a few remarks on the others in their order as they occur.

PURIFICATION is considered as essential to devotion, and the *key* of prayer, which without it is of no effect.—It is of two descriptions, the *Ghoshl*, or complete ablution of the whole body, and the *Wazoo*, or washing of the hands and feet, after a manner particularly prescribed. The first chapter treats of the occasions for purification, the accidents by which it may be broken or interrupted, and the manner in which it is to be performed. The second relates to the waters fit for ablution.—The third treats of the *teyummim*, or substitution, in cases of drought, of dust or fine sand for water; a regulation well calculated for the thirsty deserts of *Arabia* *! In directing this, MOHAMMED followed the example of the *Jews*, who were accustomed to perform their lustration after this method, in cases of necessity.—The fourth chapter relates to the anointing of *boots*, or other leathern apparel or utensils, in which certain rules are laid down for the observance of cleanliness.—The fifth regards women, the rules to be observed by them in their menstruations, and the modes of purification requisite after those, or childbed labour, to qualify them for acts of devotion.—The sixth treats of the purifications enjoined after performing any of the natural evacuations.

PRAYER is declared to be *the corner-stone of RELIGION, and the pillar of FAITH*. It is not, by the *Mussulman* doctors, considered as a thing of mere *form*, but requires that the heart and understanding should accompany it, without which it is pronounced to be of no avail.—The *prescribed* prayers are directed to be performed at five different times in the twenty-

* This practice is alluded to in vol. I. p. 195.

four hours. I. between day-break and sun-rise; II. immediately after noon; III. immediately before sun-set; IV. in the evening, before dark; and, V. before the first watch of the night. At these hours, therefore, the *Mawzins* or criers warn the people, from the *minurets* of the *mosques*, to prepare for prayer, and all devout persons forthwith either repair to the mosque, or proceed to perform their devotional exercises in some other convenient spot, after the previous lustration.—The first chapter of this book treats of the proper hours for prayer, whether prescribed or voluntary, prohibiting, at the same time, the repetition of any during the rising or setting of the sun, or at the hour of his passing the meridian.—The second chapter concerns the duty of the public criers, and the manner in which they are to summon people to worship.—The third relates to the *conditions* of prayer,—that is, those points which are regarded as essentially requisite to its efficacy;—which are as follows. I. that the person be free from every species of defilement: II. that all sumptuous apparel be previously laid aside, at the same time that the body be so far covered as to avoid any offence to decency,—unless, however, the person be destitute of clothing, in which case this is dispensed with: III. that the attention accompany the act, and be not suffered to wander to any other object, insomuch that if the person, whilst praying, cast his eyes upon a book so as to recollect the contents, his prayer is of no effect: IV. that the prayer be performed with the face towards the *Kåbla*, or temple of MECCA, the relative situation of which is for that reason pointed out in all their mosques by the position of the *Niche* for the *Imâm*, which is termed the *Mehrab*. Where, however, the relative situation of the *Kåbla* is uncertain or unknown, the person who prays is only required to observe this ceremony *to the best of his knowledge or recollection*.—The fourth chapter relates to the *nature* and *description* of the prayers, prescribing the forms proper to use on each particular occasion, and the portions of the KORAN which it is proper to read each day.—The passage most worthy of notice in this chapter is, that men are allowed to repeat the prayers, or to read the allotted portions of the KORAN, in every other language as well as the *Arabic*; “for” (as *Haneefa* well argues) “the difference of language makes no alteration in the sense; and it is not possible

“ possible that the *heart* should join in what the understanding does not comprehend.”—The fifth chapter contains the qualifications necessary to the office of a priest, and the particular duties attached to that station.—The persons held incapable of exercising this function are *slaves*, *reprobates*, the *blind*, the *Bidweens*, (people of the desert,) and *bastards*. These last are deemed unfit, because of the baseness of their birth giving room for discontent to some who might suppose themselves dishonoured by attending them in public.—This head likewise comprehends all the directions for public worship, in which certain precautions are laid down against the women mixing with the men, each sex having a particular station allotted, for the sake of decency, and also to avoid any excitement to passion.—The sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth, chapters contain merely matters of form, precaution, and so forth.—The thirteenth chapter prescribes the prayer proper to the sick, and the various forms of lustration, &c. which may be dispensed with on account of their indisposition.—The fourteenth chapter relates to the prostrations: the fifteenth contains the rules to be observed by those who travel: the sixteenth the prayers proper to *Friday* [the *Mussulman* sabbath:] the seventeenth and eighteenth those for particular fasts and festivals: the nineteenth those for rain.—The twentieth chapter prescribes the manner of performing prayer when surrounded by an enemy,—in which case the *Imâm* is directed to divide his troops into two bodies, one to oppose the foe whilst the other prays, and thus to relieve each other successively.—The twenty-first chapter contains the prayers for the DEAD, with the various forms of ablution, enshrouding, and interment.—The twenty-second relates to the same, with respect to those who are slain in battle.—The twenty-third regards the prayers proper for pilgrims who visit the inside of the temple of MECCA.

FASTING is an essential part of piety, and termed, by the orthodox, *the gate of religion*. It is of two kinds, *voluntary* and *incumbent*; and is distinguished, by the *Mussulman* divines, into three degrees: I. the restraining from every kind of nourishment or carnal indulgence: II. the restraining of the various members from any thing which might excite
 3 sinful

sinful or corrupt desires: III. the abstracting the mind wholly from worldly cares, and fixing it exclusively upon God,—which, as it is the most difficult of observance, is also accounted the most meritorious.—The great prescribed fast is that enjoined from the first new moon, in the month of *Ramzân*, until the appearance of the next,—during which it is required, from day-break until after sun-set of each day, to abstain from every sort of nourishment, inasmuch that the fast is broken by suffering any thing whatever to enter any part of the body. From this observance none are excused except the sick, aged, or children; and the first of these, if they recover, are required to make up for what they have lost, by fasting an equal number of days after their health is perfectly restored.—Any breach of this duty must moreover be expiated by a donation of alms to the poor.—The *Nisf*, or *voluntary* fasts, are those not enjoined by the Law, but which a man imposes on himself on some particular occasions, such as in expiation of a broken vow, that species of abuse to a wife termed *Zihâr*, the breach of the fast during the moon of *Ramzân*, or any other irregularity.—The first chapter of this book contains regulations with respect to the commencement and observance of the fast of *Ramzân*.—The second relates to the occasions of *expiatory* fasts.—The third treats of the *Ittikâf*, or continual residence in the *mosque* during the time of a fast.

THE PILGRIMAGE to *Mecca* is considered as such an essential point of religious duty, that no person is accounted a good *Mussulman* who, possessing the ability, neglects the performance of it, at least once in his lifetime.—The antiquity of the *Käba*, or holy temple of *Mecca*, extends far beyond the records of history, it having been used by the *Arabs* as a place of idolatrous worship for centuries before MOHAMMED's pretended mission.—He, who in an eminent degree possessed the capacity of converting the superstitions of others to his own ends, finding it necessary to give his religion some *stationary habitation*, at first fixed upon the site of the temple of *Solomon* at *Jerusalem*; and he, for a time, made that his *Käbla*, or point towards which he directed his prayers. Motives of
prudence

prudence or policy, however, in a few months dictated the necessity or convenience of preferring a place held in habitual reverence among his own countrymen; and reasons were easily found or invented to justify the change.—The traditions of the *Arabs* represent the *Käba* as a place of worship almost coeval with the world. Some accounts mention that it was first built by *Adam*, soon after his expulsion from paradise.—Other accounts say, that the father of mankind, being by his fall deprived of the light of the Divine presence, knew not which way to direct his prayers, until an exact representation of the paradisiacal tabernacle was, by the favour of the ALMIGHTY, exhibited, encompassed by a glory, on the spot where the temple now stands, directly under the station of the original *Käba* in HEAVEN*, and which spot ADAM from that period made his *Käba*.—His son SETH, after his death, erected upon the place a building of stone and clay, (or, as some say, of sun-burnt bricks,) the same in shape as the celestial one. This being destroyed by the deluge, was afterwards, at the Divine command, rebuilt by ABRAHAM and his son ISHMAEL, the great progenitor of the *Arabians*. The *Koreish* (most probably by dint of superior power) obtained possession of it, and kept it in repair for several generations.—At length, in the infancy of MOHAMMED, the old temple having fallen, or being pulled down, a new one was erected on the same foundation, and after the same model.—Again, in the twenty-fourth year of the *Higera*, having sustained some damage from the zeal of the *Mussulman* reformers, in clearing it of idols, it was once more pulled down and rebuilt by *Abou Yoosaf Ibn Al Hijâj*, then *Shareef* of *Mecca*, as it now stands.—The *Käba* is certainly a place of very great antiquity. It was, most probably, from its first foundation, the temple of an idol. Both *Arabians* and *Egyptians* regarded it with profound veneration, and every sect filled it with the images of their fantastic worship.—Amongst its pretensions to antiquity, and its fictitious excellencies, we must not pass over in silence the famous *Hijr-*

* From this fable, perhaps, originated the idea, entertained by some, of the station of the heavenly JERUSALEM, which many of the primitive *Christians* supposed to be placed directly in the zenith of the capital of *Judea*.

aswad, or *black stone*, a small block of marble or granite, which is reported to have fallen to the earth with *Adam* when he was hurled from paradise. It is at present fixed in a case of silver, in the south-east corner of the temple, and is exceedingly respected, and piously kissed by all devout pilgrims. This sacred stone was carried away by the *Carmatians*, A. H. 278, (who at the same time spoiled the temple of its *golden spout*, and other precious ornaments,) but was restored in twenty-two years after.—Another relic is the *Higr Ibraheemé*, or stone of *Abraham*, which, it is said, was used as a scaffold by the patriarch when constructing the temple in company with his son *Ishmael*.—The third object of note is the fountain or well *Zimzim*, situated to the east of the *Käba*, and the waters of which are reported to possess the same virtues as are attributed to all consecrated wells in every country. It is said that the water gushed out miraculously on this spot as *Hagar* was wandering through the desert with her son, oppressed with thirst.—Of the present state of the *Käba*, which still bears its ancient name, *Bait Oolla*, (the HOUSE of GOD,) or *Masjidal-hiram*, (the INVIOLEABLE TEMPLE,) we can only obtain a knowledge through the medium of the *Turks*, or other *Mohammedans*, as no infidel is ever admitted within the precincts of the holy territory. In its original construction it is said to have been a perfect cube, the simplest of all figures, and therefore the best calculated to typify the unity of God.—IBN AL HIJÂJ, in rebuilding it, caused a small alteration from the original figure, the temple, as it now stands, being twenty-four cubits long, twenty-three broad, and twenty-seven high. Still, however, it does not in any other respect deviate from the simplicity of its primitive form, it being entirely destitute of pilasters, cornice, or any ornament, except a veil or outer cover of black damask or velvet, a golden (or more probably gilt) band which encompasses it near the top, and a gold spout projecting from the roof to convey off the rain water.—The veil was formerly of *Egyptian* linen, and in the “*days of IGNORANCE*” was supplied by different chiefs of the *Sabeans*, or other idolatrous tribes. The piety of the *Khàlifs* substituted a more costly stuff, which, since the accession of the *Othmànian* dynasty, has been annually renewed by the *Turkish* emperors. Several inferior buildings have been erected round it, particularly four open pavilions, which serve

serve as oratories to the four orthodox sects of HANEEFA, MALIK, SHAFEI, and HANBAL.—The whole stands in the midst of a spacious area, enclosed by a magnificent portico, having twelve gates and a range of twelve steps all round, from the level of the portico into the area.—The epithet *haram* [inviolable] is not confined to this sacred spot, but extends for many miles round MECCA, small towers being placed at proper distances in every direction, to mark the precincts of the holy territory, within which it is not lawful to hunt, shoot, attack an enemy, or, in short, to commit any act of violence, except in self-defence, or for the destruction of noxious creatures, such as serpents, or animals of prey. In the neighbourhood of the city are two hills, *Saffa* and *Marwa*, the valley of *Minna*, and a sort of chapel named *Moozdalifa*, on the way thence to *Mount Arafat*, which lies at a somewhat greater distance.—The *Arabian* writers say that the city of MECCA, in the centre of which the *Käba* stands, is nearly as ancient; and indeed if we consider how long this has been a spot for the resort of superstition or devotion, it is probably one of the oldest cities in the world.—Such is the spot to which, in the month *Zee-al-Hidjee* * of every year, multitudes of *Mussulmans* repair, to prostrate themselves before the “HOUSE OF GOD,” and to perform the various ceremonies prescribed by their LAW, or sanctioned by antiquity, in most of which they vary little or nothing from their *Pagan* ancestors. We shall not dwell upon the particulars of these ceremonies. Suffice it to say, that they are in general highly absurd, and not defensible, even by the *Mussulman* doctors themselves, except on the ground of ordinance or custom. One particular it is nevertheless proper to remark upon, as it is frequently adverted to in the course of this work; namely, the state of a *Mobrim*. The caravans of *pilgrims* have each a particular place assigned, according to the parts whence they proceeded, which marks to them the boundary of the *holy territory*. Here they generally arrive towards the end of *Zee-al-Käda*, and on the first morning

* *Hidj* signifies pilgrimage;—and the month takes this name, as being peculiarly appropriated to the performance of that solemnity.

of the succeeding month (*Zee-al-Hidjee*) the prescribed ceremonies commence. The pilgrims now lay aside all other dress or ornaments, and assume the humble habit of *Ibrām*, which consists only of two colourless woollen cloths, and a kind of sandals, defending the soles of the feet, but leaving all the rest bare. It is from this time, and during the remainder of their stay in the holy territory, that the devotees bear the title of *Mohrim*. Whilst engaged in this pious work, a *Mohrim* is required to keep the strictest guard upon all his actions, and to refrain from contention, anger, and every indulgence of his carnal appetites. He is also inhibited from hunting or fowling even *beyond* the prescribed limits, not being allowed to destroy any thing for subsistence except *fish*. He is moreover under a variety of other inhibitions, which may be traced in the course of this work. For many centuries the greatest potentates were proud to submit themselves to these restrictions, and to sink, for a time, to a level with their fellow creatures.—It may not, however, be improper to observe, that for some time past, and particularly within the present century, the *Käba* has sustained a falling off both in the rank and number of its votaries. Whether this defection arises from the advancement of knowledge, or (as is most probable) from the rapid decay which the great *Mussulman* empires have experienced within that period, it certainly denotes a revolution in the minds or habits of the *Mohammedans*, which is perhaps only a prelude to the extinction of *Islamism*.—The first chapter of the book of PILGRIMAGE treats of those upon whom it is indispensably incumbent that they once in their lives visit the *Käba*; namely, upon every *Mussulman* who is sane, adult, free, in perfect health, and possessed of the means for performing a journey, such as a camel, a horse, a servant, and a maintenance sufficient for those and himself during the pilgrimage, and for the support of his family until his return. No person is, however, required to cross the *sea* for this purpose.—This duty is as much enjoined upon *women* as upon *men*; but they are directed to perform it under the protection of some male relation within the prohibited degrees.—The second chapter relates to the various ceremonies of the *Ibrām*, and the restrictions to which a *Mohrim* is subjected, as already mentioned.—The third chapter relates to the different names and descriptions

tions of pilgrimage, according as the ceremonies of it are performed alone, or in company with others; and also, the visitations performed within any other than the sacred months.—The fourth chapter treats of the restrictions to which a pilgrim is subject during his residence within the “HOLY TERRITORY,” and the offences which, from disregard of these, he is liable to commit; with the atonement required for each offence. In this chapter are also set forth the restrictions imposed upon pilgrims, and the indulgences allowed to them with respect to their wives or slaves, as well as the penalties imposed in case of infringement. A number of mere petty offences are likewise mentioned, for which atonements of a trifling nature are required, such as bestowing a day’s subsistence upon one *pauper*, or (in cases of omission) repeating any particular part of the ceremonies. The remainder of this chapter relates to the inhibitions with respect to killing game, or feeding cattle within the holy territory, in either of which cases satisfaction must be made to the Chief of MECCA.—The fifth and sixth chapters relate to points of mere form.—The seventh concerns those who may be impeded in their pilgrimage by either sickness or an enemy;—in which case, it is requisite that the person so prevented send a goat or other victim (by the hands of some trusty deputy) to be sacrificed at the temple; or else, that he send the value in money, with which the deputy may purchase an animal at *Mecca* for that purpose;—and until this ceremony be performed he is not released from the restrictions of a pilgrim.—The sixth chapter treats of the time at which the season of pilgrimage expires,—namely, on the *Yd Kirbàn*, or festival of sacrifice, when, if the pilgrim have not gone through the whole of the ceremonies, all that he has done is of no account, and the pilgrimage must be performed again on some ensuing year.—The seventh chapter relates to the performance of pilgrimage on behalf of another person, which is lawful and valid for three different descriptions of people, namely, the dead, (who have bequeathed a sum for this purpose,) persons prevented by distance, sickness, or an enemy, or persons who, having already performed the *ordained* pilgrimage, procure another to perform it again on their account, either from motives of piety, to expiate an offence, or to fulfil a vow. This kind of *substitutive* pilgrimage became indispens-

ably necessary when *Islamism* spread over regions at a considerable distance from *Arabia*, as it was utterly impossible for all the FAITHFUL in remote countries, however otherwise capable, to fulfil this duty in person. —The eighth chapter describes the HIDDEE, or gift-offering sent by deputy to be sacrificed at the temple, as before mentioned. The smallest acceptable offering is one goat. In fact, the value of the offering (as may naturally be supposed) is in proportion to the rank, piety, or vanity of the person who makes it; and instances have been known of one hundred camels, or more, being immolated in one sacrifice before the “*House of God*.” —Some other matters are added, of too trifling a nature to deserve notice.

THIS short sketch will suffice at once to shew the useless nature of these four books, and, we trust, to justify the omission of them in the *English* translation.—We shall now proceed to make a few brief remarks upon the other books, in the order in which they stand, and which, for the convenience of the reader, are numbered according to their succession.

V O L. I.

Book I. Of ZAKAT.

ZAKAT means the alms imposed by the LAW, in opposition to *Sàdká*, [charity,] which signifies the voluntary contributions of individuals, and which is treated of at large under the head of *gifts*.—As ALMS, in our application of that word, is always used to denote something purely *gratuitous*, the translator, in treating of those imposed by the *Mussulman* law, has retained the original term, to which the *English* language does not afford any expression strictly analogous. Some writers have confounded *Zakât* and *Sàdká* under one common meaning. The *Arabian* commentators, however, make an essential difference between them; for the former is merely an indispensable compliance with a legal obligation, claiming no merit in *futurity*; whereas the latter is as much an impulse of the mind as an act of the hand, and is of course entitled to its

its reward.—The impost of *Zakât* originated with MOHAMMED himself, who at first employed the revenue arising from it according to his discretion, in the support of his needy adherents; but the objects of it were afterwards ascertained by various passages in the KORAN; and it is somewhat remarkable that the Prophet particularly excluded the members of his own family from any participation in it, and this in terms which sufficiently denotes the arrogant superiority assumed by the tribe of HASHIM *. To compensate, however, for this exclusion, he admitted them to a fifth share in that proportion of the spoil which was allotted to the public treasury. For some generations after MOHAMMED this impost was regularly collected, and faithfully applied to its appointed purposes.—In most *Mussulman* territories it continues to be levied at the present day; but the original objects of its disbursement have been long since disregarded, and what was intended as a relief to the poor is now, even in the best regulated governments, carried to the exchequer of the prince, who endeavours to satisfy his conscience by a sort of commutation, in the erection of *mosques*, or the support of a few indigent and idle *Fakeers* about his palace. That which commenced in the indigence or rapacity of the sovereign, has now acquired a sort of prescriptive authority; and the revenue derived from *Zakât* is universally considered as the right of the state. It has indeed, for several centuries past, ceased to be collected upon *stationary* property, the only tax which at present bears the name of *Zakât* being that imposed on goods imported in the way of trade, from one country or district into another, and levied in the name of a *toll*.—Many of its rules will be found to apply peculiarly to ARABIA and SYRIA, the countries in which these laws originated, and where *flocks* and *herds* have ever formed a chief part of the wealth of the inhabitants. Although the laws of *Zakât* have in a great measure been superseded, or become obsolete with respect to their *original design*, yet they are worthy of attention, as incidentally involving many of the laws of property in points not immediately connected with this subject.—Under this head is

* See his declaration upon this subject, (vol. I. p. 58,)—where the *grossness* of the metaphors used by him is worthy of remark.

comprehended the *Sàdká Fittir*, or alms given to the poor on the festival of breaking Lent; because the payment of those is considered as a divine ordinance, and the amount (contrary to other descriptions of *Sàdká*) is particularly prescribed by the LAW.

ZAKAT is the only one of the five books upon the *Abadát*, or *spiritual* law, retained by the *English* translator. It is therefore immediately followed by the *Madmilat*, or *temporal* law,—commencing with MARRIAGE, and ending (properly) with BEQUEST, the last temporal act of MAN;—though a short supplementary book upon *Hermaphrodites* is added.

BOOK II. Of MARRIAGE.

THE preliminaries to this most important of all contracts, as set forth in Chap. I. are stated in terms remarkably simple. No provision is made for the execution of any written engagement; no particular form or ceremony is prescribed; but the efficiency of the whole is made to depend merely upon the oral declarations of the parties, before sufficient witnesses. In fact, *written* engagements were not in common use until some time after the establishment of *Islamism*.—A section of this chapter is occupied throughout with the matrimonial prohibitions and restrictions, with respect to which the *Mohammedan* and *Levitical* law have a close affinity. The principal of these restrictions are, that a man shall not marry his relation within the prohibited degrees; that he shall not have more than *four* wives at a time; and that he shall not marry, together, two women related to each other within the prohibited degrees.—To the political and speculative enquirer the most curious features in this book are, the passages which particularly concern WOMEN, as contained in Chap. II. and III. from which it appears, that the female sex are, among the *Mussulmans*, invested with many personal rights and independent privileges, such as certainly, in some measure, compensate for the various hard conditions to which law or custom has subjected the daughters of *Islám*.—These, as they are fully discussed in the body of the work, it is
needless

needless to recapitulate. The most striking of them which occurs under this article is, the liberty allowed to a woman to dispose of herself in marriage independent of her guardians, and the right of option which still remains to one contracted during infancy, after she shall have attained to maturity, which the law fixes at a very early age *. A woman is also entitled to possess her *dower*, or marriage settlement, as her own exclusive property, which she may dispose of by gift, will, or other deed, altogether independent of her husband, or of any claims which may lie against his estate.—Chapter VI. exhibits a still more extraordinary regard, in the *Mussulman* legislator, for the feelings of the sex, upon a point of a very delicate nature, and in which he doubtless consulted the peace of the *Haram* as much as the dictates of abstract equity.—Concerning this, however, we shall leave the text to speak for itself.

BOOK III. OF FOSTERAGE.

IN a state of society where fastidious refinement has not destroyed the genuine feelings of the heart, the tie of fosterage is, next to that of blood, of the strongest and most lasting nature.—Even in the more remote parts of our own country the NURSE is still considered rather in the light of an humble relative than a menial dependent. By the people of ASIA this idea is carried still farther; and the nursing is supposed to partake of the very nature of her from whose blood he receives his earliest nourishment. An affinity is therefore created by this circumstance, which operates to render marriage illegal in the same manner as actual consanguinity. Hence the prohibitions occasioned by fosterage are analogous to those set forth in the second section of the preceding book,—to which this is a kind of supplement.

* See Vol. III. p. 482.

BOOK IV. Of DIVORCE.

THE great variety of matter which this book embraces, and the many deviations which it admits from its main subject, the Translator shall not undertake either to account for or to defend.—From the contents of the first six chapters the reader will perceive that the *Mohammedan* law of divorce bears a strong affinity throughout to that of *MOSES*. In this, as in marriage, no written instrument is required, the repudiation being effected merely by the verbal declaration of the party.—Custom, indeed, and the municipal regulations of most *Mussulman* countries, following the example of the *Jews*, have made a *writing of divorce*, if not an essential, at least a circumstance which it would be highly indecorous to omit. What most forcibly strikes us on the perusal of this subject is the extreme facility with which a husband may rid himself of his female partner,—a facility which, when we consider the too frequent levity and fickleness of MAN, seems at first sight calculated to expose the weaker sex to the most degrading insult which malice could dictate, or caprice put in practice.—The *Arabian* legislator has, however, established so many bars, and pride itself opposes such obstacles as, if they do not completely remedy, at least tend greatly to counteract this apparent defect.—Before a divorce becomes *irreversible* it must have been pronounced three times, allowing (according to the *orthodox* form) an interval of a month to pass between each sentence,—or such a period must have elapsed as affords ample room for reflection and repentance, in cases of anger or disgust; and a reversal is, at any time before the expiration of that term, established by either word or deed, denoting a reconciliation. The husband, moreover, unless he can prove gross misbehaviour, must give up the dower.—But the most powerful obstacle to unjust or capricious repudiation is that part of the law which provides, that if a wife be once completely divorced, the husband cannot take her again, until she be previously married to, bedded with, and divorced by, another man.—To this salutary regulation chiefly is owing the dislike which obtains against divorce in all *Mussulman* countries, and the dishonour attached to it,—

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infomuch

inasmuch that the instances of it are very rare, notwithstanding the liberty which is permitted by the Law. The place and title of Chap. XV. would naturally lead us to conclude, that it treats in particular of the alimony payable to a divorced wife during the term of probation. This, however, is by no means the case; for it is made to comprehend those rights of every person which come under the denomination of MAINTENANCE,—not of the *wife* alone, but also of parents, children, poor or disabled relatives, and slaves.—With respect to domestic arrangements, this is, perhaps, the most useful section in the whole work. It evinces, in many places, a considerable spirit of humanity, and very properly introduces—

BOOK V. OF MANUMISSION.

TENDERNESS towards SLAVES is certainly a prevalent principle in the *Mussulman* law, notwithstanding some passages which occur in this treatise concerning them are directly repugnant to common feeling, and to the natural rights of MAN.—In the XXIVth chapter of the KORAN this tenderness is strongly enforced with respect to certain points in the domestic treatment of them*; and it may also be traced in various parts of this Commentary.—It is, indeed, in *practice* pretty much confined to the slaves professing the *Mussulman* faith, as it is natural to suppose that the followers of the Prophet do not entertain the same regard towards their bond-servants of other religions. Still, however, we shall be guilty of great injustice, if we form our ideas of *Mussulman* slavery from the treatment experienced by Christian captives among the barbarians of *Tunis* and *Algiers*. The precepts concerning

* The passage referred to treats of *matching* slaves who are single:—"CONTRACT (in marriage) THOSE OF THEM WHO ARE SINGLE, SUCH AS ARE WORTHY, OF YOUR MALE AND FEMALE (slaves;) IF THEY BE POOR, GOD WILL ENRICH THEM OF HIS BOUNTY."—"UNTO SUCH AS DESIRE A WRITTEN COVENANT, (of *Kitabat*,) GRANT IT, IF YE SEE GOOD IN THEM; AND GIVE THEM OF THE RICHES OF GOD, WHICH HE HATH GIVEN YOU," &c.

manumission are injunctive with respect to *believers* only; but those which recommend kindness and good usage apply to all alike. The law in many instances affords them protection against injustice, and declares them to be "*claimants of right*." It in some particulars, moreover, provides an alleviation to this otherwise most hopeless and degraded state of MAN, unknown to the more polished inhabitants of Europe;—as may be perceived in perusing the laws with respect to *Am Walids*, *Mokâtibs*, *Modabbirs*, and *Mazoons*.—To the free-born denizen of BRITAIN, the very name of SLAVE carries with it something odious and disgusting: but the *Mohammedan* bond-man, generally speaking, experiences in a very slight degree, if at all, the miseries which necessarily attend that state in some of the dependencies of EUROPE; where the riches of the community grow out of the incessant labour of wretches, whose shortened date of life is balanced against their earnings, by rules of *Algebra* and calculations of *Arithmetic*! If the slaves of *Mussulmans* appear, by their conduct, to be deserving of encouragement, they are frequently treated rather as humble friends and confidants than as servile dependents; and though inhibited from rising in the state, often, in the capacity of *Mazoons*, amass a degree of wealth which enables them to purchase their freedom.—The subject of *Manumission* is discussed at large in the first five chapters of this book.—Chap. VI. treats of a practice which was common in ARABIA before the time of MOHAMMED, and was confirmed by his precepts. It affords a strong incentive to emancipation, by enabling a master to perform an act of piety which, being posthumous in its effect, cannot injure his circumstances.—Chap. VII. exhibits a branch of that most important article, "*the establishment of parentage*." It shews, that the children born to a man by his female slaves are as legitimate as those begotten in marriage; and also, that the *Mussulman* law, like the *Roman*, does not acknowledge any affinity between a *bastard* and his father, but throws him wholly upon the mother.

Book VI. Of Vows.

OATHS are one of the bonds of society, and in many instances the chief security for public integrity and private property. Perjury, therefore, has in all communities been justly reprobated as a most flagrant crime. It is remarkable, however, that the *Mussulman* law has instituted no specific punishment for this species of offence, except in the case of *slander*, the legislator seeming to think the apprehension of punishment in a *future state* of itself sufficient to restrain men from the commission of it. This is evidently the case with respect to the expurgatory oaths required of accused or suspected persons. In matters of property, indeed, the magistrate is at liberty to punish it by a slight discretionary correction; but in those most enormous instances of it which implicate the life of MAN, the only ill consequence it induces, on discovery, is a *fine* adequate to the blood thus unjustly shed:—a very trifling atonement certainly! In this defect, however, (if it be such,) of their law, the *Mussulmans* do not stand alone.

V O L. II.

Book VII. Of PUNISHMENTS.

THIS book treats only of the punishments incurred by crimes of a *spiritual* nature, those instituted for offences against *person* or *property* being discussed under their respective heads. The punishment for adultery is certainly severe. Yet we will not, perhaps, be forward to condemn this severity, if we compare it for a moment with what is recorded in the twentieth chapter of *Leviticus* upon the same point.—In fact, from the nature of the evidence required, it was next to impossible that the offence should ever be fully proved, even among the tents of the ARABS; so that the institution of the prescribed punishment was in a great measure nugatory, except in cases of confession by the parties.

That those confessions were sometimes made in the early days of *Islamism*, is a fact; and made, as they were, at the certain expence of life, they afford a wonderful instance of devoted zeal among the first followers of MOHAMMED. Still, however, even in those instances, every means that precaution could suggest is enjoined to avoid the necessity of inflicting the sentence.—The three first chapters of this book relate entirely to *whoredom*, and the penalties incurred by each species of illegal connexion.—Chap. III. involves some curious matter concerning the retrospective limitations of testimony, which in practice extend to all cases of criminal accusation. Much here occurs, likewise, concerning the general laws of evidence, that may not be deemed unworthy of notice. Chap. IV. containing the penalties of drunkenness, exhibits a degree of lenient indulgence with respect to that vice which we should scarcely expect to meet in a *Mussulman* law-book, as it hence appears that a man may offend in this way, even to a considerable degree, without any danger of legal cognizance.—*Slander*, as treated of in Chap. V. comprehends all expressions which may either affect the reputation of a man or woman previously possessed of a fair character, or the legitimacy of their issue; and the punishment has, added to it, an effect equally just and politic, namely, incapacitating the slanderer from appearing as an evidence on any future occasion.—*Discretionary correction*, which forms the subject of Chap. VI. extends to all *petty* descriptions of personal insult, even to *abusive language*. In fact, two thirds of the punishments incurred under the *Mussulman* jurisdiction at the present day, whether in *Turkey*, *Persia*, or *India*, are inflicted under the name of *Tazeer*.—We must not pass this book without noticing the extraordinary indulgence shewn to slaves, in subjecting them, for all spiritual offences, to only *half* the punishment of freemen. The reasons alledged for this lenity manifest an uncommon degree of consideration and feeling for the state of bondage.

BOOK VIII. OF LARCINY.

THE Translator has adopted the term *Larciny*, as the title of this book, because that word expresses every species of THEFT, from the most petty to the most atrocious. The uniform punishment annexed to *Larciny* is the amputation of a limb, unless where the act has been accompanied by murder, in which case the offender forfeits his life by the law of RETALIATION.—Many arguments might be adduced against the law of mutilation in cases of *Larciny*, founded as well on the *inhumanity* as the *inefficiency* and *inconvenience* of that mode of correction. It is, however, the only method expressly authorised by the text of the KORAN;—and if we consider the force of religious prejudice, and the effect of long habit, it may perhaps appear very unadvisable to introduce any hasty alteration in the penal jurisdiction in this particular,—especially as we have nothing better to offer by way of substitute, (for surely our penal laws are still more sanguinary!) and also, as the *Gentoo* laws, with respect to theft, are strictly analogous to the *Mussulman*, in awarding mutilation under certain circumstances.—Chap. VII. of this book is particularly worthy of attention, as it respects the most daring and outrageous breach which can be made against the peace and security of society. To enter fully into the spirit of the text, in this and many other parts under the head of *Larciny*, it is requisite that we keep in mind the peculiar manners of the people in those parts of the world where the *Mussulman* law operates. It is observable that, at the end of this book, a remarkable instance is *incidentally* introduced of the forbearance of the law in a case of homicide upon *provocation*.

BOOK IX. The INSTITUTES.

THIS book contains a chief part of what may be properly termed the *political* ordinances of MOHAMMED, and is useful both in a historical and a legal view,—in the *former*, as it serves to explain the principles upon which

which the *Arabians* proceeded in their first conquests, (and in which they have been imitated by all successive generations of *Mussulmans*,) and in the *latter*, as many of the rules here laid down, with respect to subjugated countries, continue to prevail in all of that description at the present day. The nature and end of those regulations is so fully explained in the text, that they do not require any illustration or comment in this place. We shall therefore pass on to

BOOK X. *Of* FOUNDLINGS.

ONE of the earliest and most laudable attempts of MOHAMMED, in the prosecution of his pretended mission, was, to correct certain barbarous practices then prevalent among his countrymen, particularly with respect to infant children, whom it was common for the parents to expose or put to death, where they apprehended any inconvenience from the maintenance of them. The present book is to be considered merely as a comment upon his precepts in this particular.

BOOK XI. *Of* TROVES.

BOOK XII. *Of* ABSCONDING *of* SLAVES.

BOOK XIII. *Of* MISSING PERSONS.

THE rules laid down in these books will be found, in general, strictly consonant to natural justice, and such as prevail (or *ought* to prevail) in all well-regulated communities.

BOOK XIV. *Of* PARTNERSHIP.

THIS book contains a number of subtle distinctions with respect to property, in many of which acute discrimination seems to be studied more than practical

practical utility. Several of them the reader may indeed be tempted to consider rather as the scholastic reveries of an abstracted divine, than as flowing from an active intercourse with the world, or dictated by the liberal spirit of commerce.—Still, however, it will perhaps be found, that in the mass of speculation much matter is interwoven of a more substantial kind. The MUSSULMAN *laws of property* (to ascertain which is one great end of the present work) are in some instances defined with considerable precision; and the various subdivisions it exhibits to us of *representative* wealth, as opposed to *real*, gives us an interesting idea of the refinement which, so many centuries ago, subsisted in *Mohammedan* countries with respect to those particulars.

BOOK XV. *Of (pious or charitable) APPROPRIATIONS.*

IN all *Mohammedan* countries (and in none more than in HINDOSTAN) it has been a common practice to dedicate *lands, houses*, and other fixed as well as moveable property to the use of the poor, or the support of religion. The founding of a mosque, the construction of a reservoir, and even the digging of a well, for the public use, come all under the same head; and many noble monuments of these kinds are still to be seen in different parts of INDIA, the useful effects of benevolence or superstition, in the more flourishing periods of the *Mogul* empire. That empire has, indeed, long since been hastening to decay; and the monuments of *Mussulman* piety or magnificence have suffered, with it, a sympathetic dilapidation. Numberless grants of LAND, however, to pious or charitable uses, have been executed at different times, of which many are still in full force, under the general title of *Aimá*;—and these must give some interest to the subject of the present book, in which the various modes of alienation are discussed with considerable accuracy.

BOOK XVI. Of SALE.

BOOK XVII. Of SIF SALE.

To enter fully into the subjects of these books, would occupy more time and space than is consistent with the brevity of prefatory remark. The observations we have made concerning Book XIV. will equally apply to these throughout. The book of SALE is swelled by a vast accession of incidental matter. Of these the most striking is USURY, the subject of Chap. VIII. The *Mohammedans*, in this particular, closely copy the *Jewish* law, by which the *children of ISRAEL* were also strictly forbidden to exercise *usury* among *each other*.—To this chapter the book of SIF SALE may in some measure be considered as a *supplement*, since it seems chiefly calculated to guard and provide against the practice of USURY in the exchange of the *precious metals*.

BOOK XVIII. Of BAIL.

UNDER this head are comprehended all sorts of security, whether for *person* or *property*.—This book contains a good deal of *practical* matter, (particularly in the laws concerning *guarantees*,) and is therefore worthy of an attentive perusal.

BOOK XIX. TRANSFER of DEBTS,

Is in some measure supplementary to the former, as the transaction of which it treats is performed by way of giving security to a creditor.

BOOK XX. DUTIES *of the* KÂZEE.

THE subject of this book is of the utmost importance in all countries, as upon the conduct of the *magistrates* the welfare and happiness of every society must chiefly depend: and indeed the *Mohammedans* esteem it of so much importance, that several large works have been written, by their principal law commentators, under this title.—In Chap. I. and II. the proper conduct of a judge, and the behaviour required in him, are briefly defined.—In these, however, as well as in the succeeding chapters, the text wanders strangely from its professed subject, and goes into a variety of matter which would appear to fall more properly under other heads.

BOOK XXI. Of EVIDENCE.

BOOK XXII. Of RETRACTATION *of* EVIDENCE.

THESE are two as useful books as any in the whole work,—and develop some of the most important principles in judicial proceedings.—The last section of Book XXI. shews, that the punishments incurred by perjury are (as has been already noticed) of a very slight nature, and calculated to operate more upon men's *feelings* than their *fears*. The reasons for this lenity are of the same description with those urged by our lawyers. Perhaps, indeed, the infamy and perpetual disqualifications to which the witness is subjected by it may operate as effectually as those penalties which the Law prescribes;—but it is certain that *false testimony* is regarded with less abhorrence by *Mohammedans* in general than among *Christians*.

V O L. III.

Book XXIII. Of AGENCY.

Book XXIV. Of CLAIMS.

IN the former of these books nothing very remarkable occurs, the laws with respect to agents being in general analogous to those which obtain in our own courts.—Book XXIV. chiefly relates to the conduct of suits at law, and the rules to be observed, in administering oaths, &c. It also comprehends much extraneous matter with respect to the various subjects of suits.—Chap. V. treats of a point already mentioned, namely, *the establishment of parentage*. In all societies where polygamy and concubinage are allowed, this subject must necessarily afford frequent ground for litigation.

Book XXV. Of ACKNOWLEDGMENTS.

IT is only necessary to remark of this book, that *Acknowledgment*, in the *Mussulman* Law, has the same effect, in the establishment or transfer of property, as a *formal deed*.

Book XXVI. Of COMPOSITIONS.

Book XXVII. Of MOZÂRIBAT.

THOSE books contain a quantity of technical matter. *Mozâribat* seems to have been a device adopted in order to avoid the imputation of usury,
by

by which the monied man was enabled to obtain a profit from his capital without the odium of receiving any *interest* upon it.—This species of contract is in common use in *Hindostan*.

BOOK XXVIII. Of DEPOSITS.

BOOK XXIX. Of LOANS.

BOOK XXX. Of GIFTS.

THESE books chiefly consist of plain rules, applied to ordinary cases.—It is to be remarked, however, that the *Mussulman* law, with respect to gifts, differs considerably from the *Roman*, in leaving to the donor an unrestricted right of resumption.

BOOK XXXI. Of HIRE,

Is a book of considerable practical utility, as it comprehends every description of valuable usufruct, from the hire of land to that of a workman or an animal.

BOOK XXXII. Of MOKATIBS.

BOOK XXXIII. Of WILLA.

It is probable that many of the laws in those books have now fallen into disuse, or are confined to *Arabia*, *Persia*, and *Turkey*. The privileges and immunities of *WILLA*, however, still obtain in all *Mussulman* countries, and are of considerable consequence, as involving many rights liable to become subjects of litigation. The privilege allowed to a slave, of covenanting for and purchasing his freedom, place the *Mussulman* laws of bondage in a striking, but not a disagreeable light.

Book XXXIV. Of Compulsion.

It is in general agreed, by most juridical writers, that a defect of the will, arising from compulsion, is an excuse for any crime committed, and an annulment of any deed executed under it. In the *Mussulman* code this rule, however, does not invariably hold, as from what occurs under this head it appears, that *compelled* contracts or other acts are nevertheless valid in their effect; and that offences committed under the influence of fear have still a degree of criminality attached to them.

Book XXXV. Of Inhibition.

THE subject of this book comprehends every species of incapacity, whether *natural* or *accidental*. The second chapter exhibits one of the most striking features in the institutes of *Mohammedanism*.—How far legal restrictions upon adult *prodigals* are calculated for the advantage of the community at large, is not our business to inquire. It is, however, certain, that the imposition of wholesome limitations upon thoughtless extravagance, and every other species of folly, if more generally introduced, would operate powerfully to preserve the property and peace of families, and (perhaps) the virtue of individuals.—The inhibitions upon *debtors*, as contained in Chap. III. are well worthy of attention.

Book XXXVI. Of Licensed Slaves.

THAT regulation of the *Mussulman* law by which a master is empowered to endow his slave with almost all the privileges and responsibilities of a freeman, preserving, at the same time, his *property* in him inviolate, affords a strong proof of its tenderness with respect to bondage. It in fact places the slave who obtains this advantage rather in the light of an *attached dependant* than of a mere servile instrument, deprived of privilege, and destitute of volition.

BOOK XXXVII. Of USURPATION.

BOOK XXXVIII. Of SHAFFA.

THE points of discussion which occupy these books are of some importance in every view. The regulations in the former are, for the most part, sanctified by natural justice, and those in the latter, by many considerations of conveniency and expedience. Several particulars which occur in treating of *Usurpation* must indeed be referred to certain customs prevalent in *Arabia*. The right of pre-emption enjoyed in virtue of community or contiguity of property, is perhaps peculiar to the *Mussulman* law. However accommodating to the interests and partialities of individuals, this privilege may nevertheless be considered as liable to some objection, on the score of affording room for endless litigation. Under certain restrictions, it is both a *just* and a *humane* institution.

V O L. IV.

BOOK XXXIX. Of PARTITION.

THIS book relates chiefly to the division of inheritable property. By the *Mussulman* law, as by the *Roman*, parceners in an estate may be constrained to make a partition of their joint inheritance, for which purpose proper officers are appointed by public authority.—The same rule also extends to other descriptions of partnership property. The principal tendency of the disquisitions under this head is, to shew what are proper objects of partition, and in what instances the magistrate is at liberty to compel the parties to accede to the separation of their joint possessions.—The laws of *usufructuary* partition, as contained in Chap. V. possess much curious originality.

BOOK XL. COMPACTS *of* CULTIVATION.BOOK XLI. COMPACTS *of* GARDENING.

THESE books are of use chiefly on account of the regulations with respect to landed property which incidentally occur in them. They exhibit the farming of lands in a very imperfect state, and at a time when money had as yet come little into current use. They, however, explain a number of principles upon this subject equally applicable to all ages.

BOOK XLII. *Of* ZABBAH.

IN the *Mohammedan* as in the *Jewish* LAW, the eating of blood is strictly forbidden, and hence the various rules and precautions set forth under this head. It appears, from some passages, that the *Arabian* Prophet was desirous of inculcating not only a scrupulous regard to the purity of food, but also a humane and tender attention to the feelings of the animal destroyed for the purpose of supplying it.—This last is indeed a sentiment discoverable in many parts of his precepts.

BOOK XLIII. *Of* SACRIFICE.

SACRIFICE, whether as a memorial or an expiation, is one of the most ancient religious observances which occur in the history of mankind. The particular ceremony which is the subject of this book, was instituted in commemoration of ABRAHAM's obedience to the Divine command by the intended sacrifice of his son. This son the *Arabian* commentators make to be their great progenitor ISHMAEL, and not ISAAC, whom they assert to have been promised subsequent to that event. This conclusion they draw from the manner in which the whole circumstance is worded in the thirty-seventh chapter of the KORAN, though the passage

is

is certainly very equivocal. The anniversary of this rite falling on the tenth of *Zee-al-Hidjee*, [the month of pilgrimage,] it is performed by pilgrims in the valley of *Minna*, and constitutes one of the prescribed ceremonies of pilgrimage. — It is, however, equally enjoined on all others possessed of the ability; and may be performed by any man at his own habitation. The rules respecting it are few and simple; and are, in fact, of little consequence in a *civil* light, farther than as they tend to affect property. The same observation in a great degree applies to

BOOK XLIV. OF ABOMINATIONS,

A SUBJECT which involves a vast variety of frivolous matter, and must be considered chiefly in the light of a treatise upon *propriety* and *decorum*. In it is particularly exhibited the scrupulous attention paid to female modesty, and the avoidance of every act which may tend to violate it, even in thought.—It is remarkable, however, that this does not amount to that *absolute seclusion* of women supposed by some writers. In fact, this seclusion is a result of *jealousy* or *pride*, and not of any *legal injunction*, as appears in this and several other parts of the *Hedaya*. Neither is it a custom universally prevalent in *Mohammedan* countries.

BOOK XLV. CULTIVATION of waste LANDS.

IN most *Mussulman* governments, particular encouragement has been held forth to the reclaiming of barren or deserted grounds, by the powerful incentive of granting to the cultivator a property in the soil.—A considerable portion of this book is occupied with discussions upon the right to *water*, that element being justly regarded as a most valuable commodity in countries where, from the heat of the climate, the ground is liable, for the greatest part of the year, to excessive drought; and where, of course, the success of tillage must chiefly depend upon an artificial supply of it.

BOOK XLVI. PROHIBITED LIQUORS.

IN prohibiting the use of *wine*, (under which term are included all descriptions of inebriating liquors,) the Prophet meant merely to restrain his followers from unbecoming behaviour, and other evil effects of intoxication. At first the precept was issued in the KORAN simply against *drunkenness*, which amounted only to a prohibition of *excess* in the use of strong liquors; but this not proving sufficient for the purposes of complete determent, the negative injunction was produced, by which inebriating fluids were altogether proscribed, and declared unlawful. The tendency of this book is, chiefly, to exhibit the opinions of their divines concerning what kind of liquors those are which fall under the denomination of *prohibited*; in which we may trace the rigid scrupulosity of the more early *Mussulmans* upon this point. At present, however, they are not, in general, very strict observers of the LAW in this particular, their modern doctors allowing that various fluids may be drank, either medicinally or for pleasure, provided it be done with moderation, and so as to avoid scandal.

BOOK XLVII. OF HUNTING.

THIS book is, properly, a supplement to *Zabbah*; and any reflections upon it may therefore be referred to the observations under that head.

BOOK XLVIII. OF PAWNS.

BOOK XLIX. OFFENCES *against the PERSON*.

IN determining the measure of punishment for offences committed upon the *persons* of men, the *lex talionis* seems at first sight to have been dictated by natural reason, and to be consistent with justice, as affording the

the best means of a strict and equal retribution. Accordingly, we find it among the earliest institutes of every society approaching to a state of perfect civilization. Before the time of MOHAMMED, the administration of public justice being little known in *Arabia*, personal injuries were a fruitful source of private revenge and civil war, and preserved, among the descendants of ISHMAEL, a sanguinary ferocity of spirit, which was considered as a *virtue* rather than a *blemish* in their character. The Prophet soon perceived it necessary to the completion of his project, to introduce a reform in this particular; and therefore, with a view at once to indulge his countrymen's propensity to revenge, and to preserve the peace of the community, shortly after his flight to *Medina*, (as it is said,) revealed that passage of the KORAN allowing of *retaliation*, in which he has nearly copied the law of MOSES. As *equality* is the professed ground of this institution, the *Mussulman* doctors, in their comments upon it, seem to have followed the *literal* acceptation of the text, in all cases where the observance of this equality is possible. In practice, however, retaliation is seldom or never inflicted upon a *limb* or *member*; but a mulct is imposed in proportion to the injury, and according to the circumstances by which it is excited or attended.—In fact, however equitable this mode of requital may appear in some instances of personal injury, yet, when applied to all without limitation, it certainly involves much gross absurdity and injustice, a charge from which it does not stand acquitted by all the distinctions which the commentators have established concerning it in this book. Hence it is that the *Mussulman* courts, following the example of the *Jews*, understand the words of the KORAN, in all cases short of life, in the same manner as those do the *Pentateuch*; that is, *not* as awarding an *actual* retaliation, according to the strict literal meaning, but an atonement in exact proportion to the injury.—Thus much with respect to *wilful* offences. That law by which a man is made responsible in his property for offences unintentional or merely accidental, is certainly, in some instances, rather rigorous. It was, however, well calculated, in an irregular society, and a defective state of civilization, to guard men from acting carelessly, and has a strong tendency to support and inculcate the sacredness

sacredness of the person of MAN.—We shall speak more fully upon this subject, in treating of

BOOK L. Of FINES.

ALTHOUGH the manner in which this subject is treated involves a considerable portion of frivolous absurdity, yet we also find, in the course of its discussions, many wise and salutary regulations, both for preserving the security of the person, and the peace and good order of society. We may perceive, from the perusal of it, that a man is made responsible not only for his overt acts, but likewise for any injury which may be more remotely occasioned by his carelessness, obstinacy, or wilful neglect. The degree of the fine was originally fixed at a certain amount, that for the life of a man being determined at one hundred camels, and all others at a proportionable rate, according to the injury. In later times, however, the changes in manners, and in the value of property, introduced other modes of ascertaining amercement, and fines came to be levied not only in proportion to the injury sustained, but also according to the circumstances of the case.—Chap. VI. exhibits the only species of *inquest* admitted by the *Mussulman* law in cases of uncertain homicide, consisting solely of expurgatory oaths. However well calculated this may have been for the meridian of *Arabia* or *Irak*, and for the state of society in those countries at the time these laws were first systematized into a code, it is certainly but a poor device for the detection of guilt or the ascertainment of fact in a well-regulated community.—It is remarkable that a law strictly correspondent to what is mentioned in this chapter formerly prevailed among the *Saxons* and other northern nations of EUROPE, where the responsibility for unascertainable bloodshed lay with the master of the family, or with the people of the *tything* in which the body was found.

BOOK LI. *The LEVYING of FINES.*

THE subject of this book is purely of a *local* nature, relating entirely to the levying of fines upon the *Arabian* tribes for offences unintentionally committed by any individual of them.—These regulations serve to give us a pretty clear idea of the state of society in the native land of *Islamism*. However useless, and perhaps impracticable, in a more advanced state of refinement, these, as well as many regulations in the two preceding books, were well calculated to reduce a fierce people under the restraints of law and civil government.

BOOK LII. *Of WILLS.*

WITH respect to the *forms* of wills, the same observations occur as have been already made in treating of MARRIAGE.—In fact, as writing was formerly very little in use among the *Arabs*, all deeds are, in the commentaries upon their laws, regarded and mentioned as being merely *oral*. Hence WILLS, as discussed in this book, are solely of the *nuncupative* description. The most remarkable features in this book are, the restrictions imposed upon testators with respect to the disposal of their property.

BOOK LIII. *Of HERMAPHRODITES.*

THIS book, and the succeeding chapter, which, because of its being detached from any particular subject, is termed CHAPTER THE LAST, are a kind of *supplement* to the rest of the work. *Hermaphrodites* are probably a class of beings which exist in imagination rather than in reality. We shall therefore leave this book to speak for itself.—The last chapter is worthy of particular notice, as (if we except *bills of sale* and *judicial letters*) it

is the only part of the work in which any thing is mentioned concerning *forms of Writing*.

IN concluding this short review, the Translator esteems it his duty to add, that it is a very imperfect summary indeed of the work which is now presented to the Public. The subjects of it would admit of a much more ample discussion.—But to enter into a comparative and analytical survey of topics so numerous and important would of itself require a large volume; and the patience of the reader is perhaps exhausted. The more particular investigation of them we shall therefore leave to his own reflections or inquiries; and hasten to conclude an essay, for the length of which no other apology can be offered, than an anxious wish to forward the chief end of this publication, by throwing some light upon a subject dry in itself, and not without its difficulties, and accommodating it to the perceptions of those whom duty or curiosity may lead to make it an object of their study.

OF the *importance* of a work in which the Translator has borne so large a share, it may not become him to say much; but as the objects of it are of a *public* nature, and as it has been brought forward in some measure at the public expence, he feels himself called upon to hazard a few words in vindication of its probable utility.

WITH respect to the immediate end proposed by those who originally projected this translation, all that is necessary to be stated may be resolved into one summary argument. While the *Mohammedan* Law is allowed to be the sole standard of criminal, and in a great measure of civil jurisprudence throughout our dominions in INDIA, (and it would perhaps be neither prudent nor possible hastily to introduce any other system,) it appears indispensably necessary that those who are to protect the rights of the people, and who are responsible for the proper administration of public justice, should possess the means of consulting the principles on which the
decisions

decisions of the *Mussulman* courts are founded. This reflection acquires still greater weight, when we consider how very large a portion of subjects under the British government in INDIA are *Mohammedans*, upon whose attachment to their rulers much of the prosperity of our *Asiatic* empire must necessarily depend.

THE advantages to be derived from a development of the institutes of MOHAMMED are, however, not confined to the administration of justice in our *Asiatic* territories. The commerce of GREAT BRITAIN extends to almost every region where his religion is professed; and as this work is a commentary upon the juridical code of the OTTOMAN as well as of the MOGUL empire, and is applicable to the customs and judicial regulations of *Cairo*, *Aleppo*, or *Constantinople*, as well as of *Delhi* or *Moorshedabad*,—it can scarcely fail to open a source of desirable knowledge to the merchant and the traveller. In a *political* view, likewise, it is humbly presumed that this work will not be found altogether uninteresting. At the present eventful period, when we have seen new empires springing into birth, and the old indignantly throwing off the long-rivettèd chains of despotism, the grandest remaining fabric of *Islamism* seems hastening to its fall.—In expecting this mighty ruin, we are naturally led to inquire upon what principles the fabric was founded, and to what causes we are to attribute its decay.—Some parts of the following treatise are particularly calculated to assist us in such an investigation. We may there observe that, however sagaciously it might be formed for the sudden extension of dominion, during an age when mankind were involved in the darkest gloom of superstition and ignorance, the *Mussulman* system, civil and religious, is but wretchedly adapted to the purposes of public security or private virtue. We may observe, with some degree of laudable exultation, its obvious inferiority, in every useful view, to that excellent system which we profess, and which is so admirably calculated to promote the temporal good of mankind, as well as their eternal happiness!

BUT

BUT it is time to close this address. The Translator cannot, however, conclude without paying that tribute which justice and gratitude demand. —Concerning the public zeal, the penetrating and comprehensive mind, of the Gentleman to whom the work is dedicated, it is unnecessary to enlarge in this place. From him the present translation derives its existence; and the merit of his design received its best confirmation in the continuance of support it experienced from his immediate superiors, as well as from his successors in office.—To the liberal attention and honourable confidence of SIR JOHN MACPHERSON and his Colleagues in the *BENGAL* government it is owing, that the Translator was at all enabled to look forward to the completion of his labours. Yet this attention and confidence, flattering as they were, would not have sufficed to bear him through an arduous and expensive undertaking, had it not been aided by the generous and munificent support of the COURT OF DIRECTORS, whose regard to every effort which may tend to promote the interests of our Oriental dominions has been repeatedly experienced both by himself and others. Conscious of his own deficiencies, he has only to hope it may appear, that what they have liberally granted has been faithfully and diligently employed. He entertains too humble an opinion of his abilities not to be sensible that, with all his assiduity, aided by the many happy suggestions of the worthy and excellent friend who had for some time been his Colleague in the performance, it will still be found far short of perfection. —The chief business of a translator, when engaged in an undertaking of this kind, is *scrupulous accuracy*, and the only merit he can claim *laborious application*. The former of these the present Translator has endeavoured to preserve, and the latter he presumes to affirm has not been wanting. Nevertheless, there is undoubtedly much room for correction and amendment. The very nature of the work rendered the translation of it a business attended with no common degree of difficulty. Treating of an abstruse science, the technical terms of which are but nakedly explained, and frequently not to be met with in any of his guides, all the light the Translator could obtain to a knowledge of his subject necessarily sprung out of the text; and consequently, as he advanced, he saw continual occasion for retrospective alterations, which amounted to little less than

than a repetition of his labour. He found himself therefore frequently at a loss; and repeatedly experienced the truth of an observation made by our immortal Lexicographer,—that “a writer may often in vain trace his memory, at the moment of need, for that which yesterday he knew with intuitive readiness, and which will come uncalled into his thoughts to-morrow.”

In confirmation of his wish to render this publication, as much as in his power, worthy of the patronage under which it has been conducted, the Translator hopes he may be indulged in the egotism of the remark,—that he has dedicated his three last years unremittedly to revival or re-translation.—He now dismisses it with an anxious wish that *that* patronage may not appear to have been bestowed, or his own efforts applied, in vain!

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THE
HEDAYA, or GUIDE;

A
C O M M E N T A R Y
ON THE
MUSSULMAN LAWS.

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Chap.

-INTRO-

INTRODUCTORY ADDRESS:

BY THE

C O M P O S E R S

OF THE

P E R S I A N V E R S I O N

OF THE

H E D A Y A.

PRAISE and glory unbounded is due to that adorable Being, in the investigation of whose ways, through their several mazes, the most learned theologians are exhausted, and the most contemplative philosophers, in the wilderness of research, find the foot of comprehension shackled with the fetters of amazement!—Duly to return thanks for his favours (which to offer is a duty indispensably incumbent on every existent being) is impossible; and to touch the skirt of his intelligence

(which exceeds the power of the finger of diligence) by force of reason and study, impracticable!—Salutations innumerable are also to be presented at the tribunal of HIM who is seated on the elect throne, to follow whose infallible institutes is a certain means of attaining the Divine favour, and whose world-illuminating Lamp of LAW derives its sacred light from the morning beams of the Day of Judgment.—All honour and blessing upon him, and upon his holy family, and his worthy COMPANIONS!—Upon the tablets of the hearts of those who adorn the exordium of the book of knowledge and wisdom, and upon the minds of those who expound the collected mysteries of the creation, it is impressed,—that, from the day that the delightful region of BENGAL was cheered by the rays of Government of the *Nawab* Governor-General, Mr. WARREN HASTINGS, the whole of his wise and prudent attention was occupied and directed to this point,—that the care and protection of the country, and the administration of public affairs, should be placed on such a footing, that the community, being sheltered from the scorching heat of the sun of violence and tyranny, might find the gates closed against injustice and oppression; and that the range of sedition in those who deviate from the road of truth might be limited and shortened:—and since this hope must be fulfilled through the influence of the holy LAW of the PROPHET, and the injunctions and inhibitions of the chosen sect,—this denizen of the kingdom of humility and solitude,

solitude, named GHOLAM YEHEE, was therefore instructed and empowered, together with *Molla* TAJ-ADDEEN, *Meer* MOHAMMED HOSSEIN, and *Molla* SHARREEAT OOLLA, to translate from the *Arabic* language into the *Persian* idiom certain treatises upon the LAW, but particularly that excellent work the *HEDÀRA*, (which, from its great subtilty, and the closeness of its stile, is a species of miracle,)—to which, accordingly, with their assistance, applying his attention, the *Arabic* text was, as much as it would admit, reduced into a *Persian* version; which they have entitled the *HEDÀRA FARSEE*, [*Persian Guide*,]—hoping that mankind may thereby find their wants supplied, and that profit and advantage may thence accrue.

FROM those who travel in this fruitful garden let it not be concealed, that where, in the course of their investigation, the word *Sbeikbine* [the *two Elders*] is mentioned, it signifies the two renowned Doctors *Imâm* ABOO HANEEFA, and the most illustrious of his disciples, *Imâm* ABOO YOOSAF:—where the word *Tirrafine* [the *two extremes*] is written, it imports the sublime name of ABOO HANEEFA (on whom be the peace of God) and *Imâm* MOHAMMED, who stands next in rank to the two *Elders*; and by the term *Sabibine* [the

[the *two Disciples*] are intended the two scholars of HANEEFA, upon both of whom be the blessing of God!

A HOPE is indulged, from the benevolence of those who shall peruse the following pages, that if, in passing over the vallies and the hills of this long journey, it should happen that the foot of meditation has any where slipped from its place, they will not treat it with severity, nor expose it to the finger of scorn or reprehension.—The guidance is with God!

TRANS-

TRANSLATION

OF THE

H E D A Y A;

A

COMMENTARY

ON THE

M U S S U L M A N L A W S.

B O O K I.

Of ZAKÂT.

ZAKÂT, in its primitive sense, means *purification*, whence it is also used to express a contribution of a portion of property assigned to the use of the poor, as a sanctification of the remain-

Definition of
the term.

VOL. I.

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der

der to the proprietor. It is by some commentators termed *the indispensable alms*.

Chap. I. Introductory.

Chap. II. Of *Zakât* from *Sowâyeem*, that is, *Herds and Flocks*.

Chap. III. Of *Zakât* from personal Effects.

Chap. IV. Of the Laws respecting those who come before the Collector.

Chap. V. Of Mines, and buried Treasures.

Chap. VI. Of *Zakât* from the Fruits of the Earth.

Chap. VII. Of the Disbursement of *Zakât*.

Chap. VIII. Of *Sadka-fittir*.

C H A P. I.

Obligation of
Zakât, and
the condi-
tions upon
which it is in-
cumbent.

ZAK Â T is an ordinance of God, incumbent upon every person who is free, sane, adult, and a Mussulman, provided he be possessed, in full propriety, of such estate or effects as are termed in the language of the law a *Nisâb*, and that he has been in possession of the same for the space of *one complete year*, which is denominated *Hawlân-Hâwl*. The reason of this obligation is found in the word of God, who has ordained it in the KORAN, saying, "BESTOW ZAKÂT." The same injunction occurs in the traditions; and it is moreover universally admitted. The reason for *freedom* being a requisite condition is, that this is essential to the complete possession of property. The reason why *sanity of intellect* and *maturity of age* are requisite conditions shall be hereafter demonstrated. The reason why the Mussulman faith is made a condition is, that the rendering of *Zakât* is an act of piety, and such cannot proceed from an infidel. The reason
for

for the possession of a *Nisâb* being a condition is, that the Prophet has determined the obligation of *Zakât* upon that amount. The reasons for *Hawlân-Hâwl* being made a requisite condition are twofold; FIRST, because some space of time is necessary to increase* of property, and the law determines this at *one year*, because the Prophet has declared, “*ZAKÂT is not due upon property until the same shall have been possessed one year by the proprietor:*”—SECONDLY, the proprietor of a *Nisâb* is able, within such a period, to obtain an increase from it, since in a year there are four seasons, in each of which it most commonly happens that such property bears a different price; wherefore the rule is determined accordingly. It is to be observed, that some maintain *Zakât* to be due immediately upon the completion of *Hawlân-Hâwl*, and others that it is so through life†.

ZAKÂT is not incumbent upon infants or maniacs.—*Shafeï* declares *Zakât* to be an obligation connected with property, and therefore that it is incumbent upon those, as well as upon other proprietors, in the same manner as subsistence to a wife, and *Tythe* and *Tribute*: but to this our doctors reply that *Zakât* is an act of piety, and, as such, is fulfilled only by being paid with the option of those who are subject to it; and infants and maniacs are not held in law to be possessed of option, this being necessarily connected with *reason*, which they are not endowed with; but this does not apply to *Tribute*, as that is a provision arising from the soil, for the expences of the state; nor to *Tythe*, as that is also in some shape of the same nature.

Zakât is not due from infants nor from maniacs,

* By increase is here understood that obtained by *breeding*, where the *Nisâb* consists of cattle, or by *profit*, where it consists of merchandise.

† That is to say, annually, upon the same property, so long as it remains with the proprietor.

with certain
exceptions ;

If a lunatic have lucid intervals within the year, it is the same as if they happened within the month of *Ramzân* ; that is to say, if he recovers his reason within the year, he is subject to *Zakât*, in the same manner as if he were to recover it within the month of *Ramzân*, in which case he would have to make up for the days of Lent he had omitted in consequence of his insanity.—*Aboo Yoosaf* has observed that regard is to be paid to the length or continuance of the lucid intervals ; that is to say, if they continue the greater part of the year, the lunatic is subject to *Zakât* ; but if he be insane for the greater part, it is not incumbent upon him. It is to be observed, that *original* and *supervenient* insanity are here considered as the same ; by *original* is understood that which appears in a person in infancy, and continues upon him as he grows up to puberty ; and by *supervenient*, that which occurs after a person has attained the years of maturity. It is related as an opinion of *Aboo Yoosaf*, that if a person attain maturity in a state of insanity, and then becomes sane, the year* is considered to commence from the instant of his recovery, the same as a boy attaining puberty, with whom it is regarded as commencing on the day of his majority.

nor from
Mokâtibs ;

ZAKÂT is not incumbent upon a *Mokâtib*, he not being completely and independently possessed of property, since he is still a *slave* ; whence it is that he is not at liberty to emancipate any of *his own slaves*.

nor from in-
solvent debt-
ors :

ZAKÂT is not incumbent upon a man against whom there are debts equal to, or exceeding, the amount of his whole property. *Imâm Shafëi* alledges that it is incumbent, because the cause of the obligation, to wit, *possession of an increasing NISÂB*, is established. To this our doctors reply, that such a *Nisâb* is not possessed by him

* For the establishment of *Hawlân-Hâwl* in his possessions.

clear of incumbrance, and is therefore held to be non-existent, the same as water, which, when provided for the sole purpose of drink *, is held to be non-existent with respect to performance of the *Tammeem*, and cloth provided for the purpose of apparel, which is held non-existent with respect to the obligation of *Zakât*. But if his property exceed his debts, *Zakât* is due upon the excess, provided the same amount to what is sufficient to constitute a *Nisâb*, and that it be free from incumbrance. By the debts here mentioned are understood those due to individuals; such therefore as are due in consequence of vows, or on account of expiations, do not forbid the obligation to pay *Zakât*: but a debt of *Zakât* forbids the obligation to pay *Zakât* in the continuance of the *Nisâb*, as that would be thereby rendered defective: and, in like manner, a debt of *Zakât* forbids *Zakât* after the dissolution of the *Nisâb*. The case of the *continuance* of a *Nisâb* is, where the proprietor keeps it for two years without rendering any *Zakât* upon it, in which case no *Zakât* is due from him on account of the *second* year; because a *Zakât*, in the proportion of *one* in *forty*, is already due on account of the preceding year, whence the full amount necessary to constitute a *Nisâb* does not remain in the second year: and the case of *dissolution* of the *Nisâb* is, where the proprietor keeps the same for the full space of *one year* without paying *Zakât*, and then disposes of the *Nisâb*, and afterwards becomes possessed of another *Nisâb*, and this also continues in his possession for the complete space of one year; in which case, no *Zakat* is due upon this second *Nisâb*, because a proportion of *one* in *forty* is already occupied by the *Zakât* due on the former *Nisâb* which has been disposed of. *Ziffer* controverts the rule in both these cases: and it is also said that *Abou Yoosaf* controverts it with respect to the second case. The reason why a debt of *Zakât* thus forbids any further obligation to pay

* As in the caravans, where water is provided and carried upon camels for *drink*, but not for the purpose of *purification*, which in that or similar situations is permitted to be performed with *sand*.

Zakât is, that the claimant of a debt of *Zakât* is, in fact, *an individual**, as the claimant thereof, in pastures, is the *Imâm*, and, in articles of merchandise, the deputy of the *Imâm*†; and the proprietor of the property, in all other articles, is the *Imâm's* substitute ‡.

nor upon the
necessaries of
life :

ZAKÂT is not due upon dwelling-houses or articles of clothing or household furniture, or cattle kept for immediate use, or slaves employed as actual servants, or armour, or weapons designed for present use; all these falling under the description of *necessaries*; neither are such considered as *increasing property*: and the same of *books of science*, with respect to *scholars*, and likewise of *tools*, with respect to *handicrafts*; these being to them as *necessaries*.

nor upon
uncertain
property.:

If a man have a claim upon another for a *debt*, and the other dispute the same, and some years thus pass away, and the claimant be destitute of proof, and the debtor afterwards make a declaration or acknowledgment publicly, inasmuch that there are witnesses of the same, there is no obligation upon the claimant to render any *Zakât* § for so many years as have thus passed. This uncertain sort of property is termed, in the language of the law, *Zimâr*; and *trove* property, and fugitive slaves, and *usurped* property, respecting which there is no proof, and property sunk in the sea, or buried in the desert and its place forgotten, and property tyrannically seized

* In opposition to *God*; for, if *Zakât* were claimed purely as a right of *God*, the payment of it would be absolutely and unconditionally incumbent.

† Because the *Imâm* is always supposed to collect the *Zakât* upon pastures in person, and that upon merchandise by his deputies, *i. e.* by collectors placed at particular stations for that purpose.

‡ As the payment of *Zakât*, upon all other articles, is committed to the proprietor himself.

§ Upon the property which is the subject of the claim.

by

by the Sultan, are all of the description of *Zimâr*: and all these articles are equally exempted from *Sadka-fittir* *. *Ziffer* and *Shafëi* maintain, that all these articles are subject both to *Zakât*, and also to *Sadka-fittir*, as the cause of the obligation to pay *Zakât* (to wit, possession of a *Nisâb*) is established in each of them, although it was not in the immediate seisin of the proprietor whilst it fell under the description of *Zimâr*, which does not forbid the obligation to *Zakât*; like the property of a traveller, which, if it remain in his house, is nevertheless subject to *Zakât*, although it be not at the time in his hands. The arguments of our doctors herein are two-fold; FIRST, *Alee* declared that no *Zakât* is due upon *Zimâr* property: SECONDLY, the cause of the obligation to pay *Zakât* is the possession of property in a state of increase, which cannot be the case but where the proprietor has an immediate power of management over it; but this does not apply to a traveller who has property at home, as he may manage it by agents.

PROPERTY buried in the house of the proprietor is not *Zimâr*, because it is easily recovered; but, with respect to property buried in any other ground than that on which the house actually stands (such as the *garden*, for instance), there is a difference among our modern doctors.

PROPERTY which is acknowledged by a debtor to be owing to his creditor is subject to *Zakât*, whether such debtor be rich or poor, because the recovery of it is possible; or if the debtor dispute the demand, yet here also the property in question is subject to *Zakât*, provided there be proof sufficient to substantiate the creditor's claim; or that the *Kâzee* himself be satisfied of the justice of it; because

it is due upon unquestionable property.

* For an explanation of *Sadka-fittir*, see Chap. VIII.

here

here also recovery is possible. And if the acknowledging debtor be poor,—that is to say, if the *Kâzee* declare him insolvent,—yet here also the property in question is subject to *Zakât*, according to *Haneefa*,—he holding that a *Kâzee*'s declaration of the insolvency of a debtor is not approved: but *Imâm Mohammed* maintains that the property in this case is not subject to *Zakât*,—he holding a *Kâzee*'s declaration of a debtor's insolvency to be approved.—*Aboo Yoosaf* agrees with *Mohammed* respecting the validity of a *Kâzee*'s decree of insolvency; but he, at the same time, coincides with *Haneefa*, that the property of which the debt consists is not, in this case, subject to *Zakât*.

Intention of traffick in property subjects it to *Zakât*.

If a person purchase a female slave for the purpose of traffick, and afterwards retain her for his own use, declaring his intention, no *Zakât* is due upon her, because the intention is here connected with the act, namely, the relinquishment of traffick in her; and an intention thus declared, when connected with an act, is to be credited:—and if he should afterwards declare a design of trafficking in her, yet no *Zakât* will be due upon her in virtue of such declaration, until he actually dispose of her by sale, because here the intention is not connected with the act, and consequently she is not held to be a subject of traffick from his declaration, unless he actually sell her, when *Zakât* is due upon her price.

If a person purchase a thing with an intention of traffick, it is to be considered as an article of traffick, on account of the connection of an intention of traffick with the act, to wit, purchase: contrary to a case where a person obtains possession of property by inheritance, and intends to traffick in the same, such not being considered an article of traffick merely from the intention, since that, in this case, bears no relation to the act*.

* That is, to the means by which such property was acquired.

IF a man become possessed of property by *gift*, or *bequest*, or *marriage*, or *Khoola*, or *composition for blood*, and intend trafficking in the same, it becomes (and is, in virtue of his intention, considered as) an article of merchandize,—according to *Abou Yoosaf*,—he holding the *intention* here to be connected with the *act*. It is related as an opinion of *Imâm Mohammed* that this property does not become as *merchandize*, because the intention is not here connected with the *act* of traffick, which is understood only by *purchase* and *sale*: some, however, have related this difference of opinion the reverse of what is here mentioned.

THE payment of *Zakât* is not lawful, except under an intention existing at the period of such payment, or at the period of setting apart the proportion of *Zakât* from the *Nisâb*-property, because the rendering of *Zakât* is an act of piety, to which the intention is essential; and a radical principle of the intention is that it be connected with the payment: but yet, inasmuch as the giving of *Zakât* to the poor is necessarily an act of frequent repetition and occurrence, it suffices that the intention exist at the period of setting apart the proportion of *Zakât*, (as aforesaid,) for the sake of convenience.

Intention of *Zakât*, in the payment, necessary to its validity;

IF a man bestow his *whole property* in charity, without intention of *Zakât*, the obligation of *Zakât*, with respect to him, drops, upon a principle of benevolence, because such obligation extends to a *certain part* of his property only; and where *the whole* is thus bestowed, that *part* is necessarily included; whence it is that there is no necessity for his specifying the same by *intention*.

Excepting under certain circumstances.

IF a man give to the poor a *portion* of his *Nisâb* property, without intention of *Zakât*, his obligation to *Zakât* drops with respect to such portion, (according to *Mohammed*,) because the part of his property due

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(on account of *Zakât*) affects the whole of his *Nisâb* equally,—wherefore, when a part of the *Nisâb* is thus bestowed, the proportion due upon such part goes along with it. *Abou Yoosaf* maintains that the obligation to the *Zakât* of that portion does not drop, because no part thereof is particularly specified as *Zakât*, the remainder of the *Nisâb* being the subject from which the obligation is to be discharged: contrary to where the whole *Nisâb* has been bestowed, since there the proportion due on account of *Zakât* goes, *a certiori*, as being involved in the *whole*.

CHAPTER II.

Of ZAKÂT from *Sawâyeem*; that is, *Herd*s and *Flocks*.

Definition of
Sawâyeem.

SAWÂYEEM is the plural of *Sâyeema*; and *Sâyeema* is, by the learned, understood to imply camels, oxen, goats, and other animals, which subsist for the greater part of the year upon pasture; wherefore, if they live but half the year in pastures, and are fed, for the other half, upon forage, they do not fall under the description of *Sawâyeem* *.—And this chapter is divided into several heads.

SECTION I.

Of the ZAKÂT of *Camels*, &c.

One goat due
upon five
camels, &c.

NO ZAKÂT is due on fewer than five camels; and upon five camels the *Zakât* is one goat, provided they subsist upon pasture throughout

* This term is in our dictionaries translated *pastures*, but the above is the precise definition of it.

the year ; because *Zakât* is due only upon such camels as live on pasture, and not upon those which are fed in the house with forage.

ONE goat is due upon any number of camels from *five* to *nine* ; and two goats is the *Zakât* on any number from *ten* to *fourteen* ; and *three* on any number from *fourteen* to *nineteen* ; and *four* upon any number from *twenty* to *twenty-four* : and upon any number of camels from *twenty-five* to *thirty-five* the *Zakât* is a *Binnit-Makhâfs*, that is, a yearling camel's colt ; and upon any number from *thirty-six* to *forty-five*, a *Binnit-liboon*, or camel's colt of two years ; and upon any number from *forty-six* to *sixty*, a *Hikka*, or four year old female camel ; and upon any number from *sixty-one* to *seventy-five*, a *Fazee-yat*, or five year old female camel ; and for any number from *seventy-six* to *ninety*, the *Zakât* is two camel's colts of two years ; and on any number from *ninety-one* to *one hundred and twenty*, two *Hikkas*. These proportions of *Zakât* upon camels are what were written by the prophet in his letters and instructions to his public officers and *Aumeels*. And when the number of camels exceeds *one hundred and twenty*, the *Zakât* is calculated by the aforesaid rule ; that is to say, where the whole number is *one hundred and twenty-five*, (for instance,) the *Zakât* is one goat for the odd five, and two *Hikkas* for the one hundred and twenty ; and if the excess number be *ten*, two goats ; and if it be *fifteen*, three goats ; and if it be *twenty*, four goats ; and if it be *twenty-five*, a yearling camel's colt : and if the whole number of camels be *one hundred and fifty*, the *Zakât* is three *Hikkas* ; and if the number exceed *one hundred and fifty* by *five*, it is then one goat and three *Hikkas*, that is to say, three *Hikkas* upon the *hundred and fifty*, and a goat upon the odd *five* ; and upon *one hundred and sixty* camels, the *Zakât* is three *Hikkas* and two goats ; and upon *one hundred and seventy*, three *Hikkas* and four goats ; and upon *one hundred and seventy-five*, three *Hikkas* and one yearling colt ; and upon any number from *one hundred and eighty-six* to *one hundred*

and ninety-five, the *Zakât* is three *Hikkas* and a two-year old colt; and upon any number from one hundred and ninety-six to two hundred, the *Zakât* is four *Hikkas*: and in this manner is the *Zakât* to be calculated upon every fifty camels exceeding one hundred and fifty.— This arrangement is according to our doctors. *Shafeï* alledges that when the number exceeds the *hundred and twenty* by one only, the *Zakât* is three two year old colts; and if it amount to one hundred and thirty, it is one *Hikka* and two two year old colts; after which the *Zakât* is calculated at a two year old colt upon every forty camels, and a *Hikka* upon every fifty; the prophet, upon a particular occasion, having written to one of his *Aumeels* to this effect, without making any mention of a goat upon the odd five, and so forth. But our doctors, in support of their opinion, as above, cite the letters of the prophet to *Omar*, where he says, “upon every five camels the *Zakât* is one goat.” And it is to be observed that, in the payment of the *Zakât* of camels, females alone are lawful, because males are held to be lawful only in regard to their value*, such being recorded both in the sacred writings and in the traditions.

Female camels only lawful in the payment of *Zakât*.

Camels of all descriptions included.

CAMELS of every description, whether *Bactrian*, *Arabian*, or others, are all included in these rules of *Zakât*, as the term *camel* [*Shûtr*] is common to all.

S E C T. II.

Of the ZAKÂT of Horned Cattle.

One yearling due upon thirty kine, &c.

No *Zakât* is due upon fewer than thirty kine; and upon thirty kine, which feed on pasture for the greater part of the year, there is due at the end of the year a *Zakât* of one *Tubbee*, that is, a follower, or yearling calf, male or female; and upon forty kine there is due one

* That is to say, the price of a male is held to be lawful in *Zakât*, but not the animal.

Misna,

Misna, or calf of two years, male or female, on the authority of the prophet; and where the number exceeds *forty*, the *Zakât* (according to HANEEFA) is to be calculated, agreeably to this rule, so far as *sixty*; that is to say, if there be one animal more than the *forty*, there is an additional *Zakât* of the *fortieth* part of a *Misna*; and if *two*, of the *twentieth* part of a *Misna*; and so on to the number *sixty*.—What is here advanced accords with the *Mabsoot*; and the ground upon which it proceeds is that, in the sacred writings, the *Zakât* is particularly specified for any number between *thirty* and *forty*, and also for those of *sixty* and above, but none for the numbers between *forty* and *sixty*. *Hasan* states the doctrine of *Haneefa* to be, in this case, that, on the numbers from *forty* to *forty-nine*, no excess *Zakât* whatever is due; and that upon *fifty* kine the *Zakât* is one *Misna*, and the fourth of a *Misna*, or the third of a *Tubbee*; because upon every *Akid*, or drove of even number, in a *Nisâb* of cattle, such as *thirty*, *forty*, or *fifty* head, *Zakât* is due, but not upon any intermediate number.—The two disciples say that no *Zakât* whatever is due upon any odd number between *forty* and *fifty*; and there is also one tradition of the opinion of *Haneefa* to this effect: and the reason they alledge is, that the prophet said to *Mâaz*, “Take not any thing from an *Owkâs* of kine;” and he explained an *Owkâs* to mean any number between *forty* and *sixty*. And upon *sixty* kine, the *Zakât* is two yearling calves, male or female: and upon *seventy*, one *Misna* and one *Tubbee*: and upon *eighty*, two *Misnas*: and upon *ninety*, three *Tubbees*: and upon *one hundred*, two *Tubbees* and one *Misna*: and thus on every *ten* head a *Misna* and a *Tubbee* alternately, the prophet having ordained that the *Zakât* upon *thirty* kine should be a *Tubbee*; and that upon *forty* a *Misna*:—thus, upon *one hundred and ten* kine, the *Zakât* is two *Misnas* and one *Tubbee*; and upon *one hundred and twenty*, four *Tubbees*.

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THE usual method however of calculating the *Zakât* upon large herds of cattle is, by dividing them into *thirties* or *forties*, imposing upon every *thirty* one *Tubbee*; or upon every *forty* one *Misna*.

Buffaloes are included with other horned cattle.

It is to be observed that *buffaloes* are included with *kine* in the laws of *Zakât*, these being also considered as a species of *black cattle*: but yet, in our country*, the *buffalo* is not regarded as of the *black cattle* species; whence it is that if a person were to make a vow, saying, "I will not eat of the flesh of black cattle," and were afterwards to eat *buffalo beef*, he would not be forsworn.

S E C T. III.

Of the ZAKÂT of Goats.

One goat due upon forty goats, &c.

No *Zakât* is due upon fewer than *forty goats*; and upon *forty* goats, which feed for the greater part of the year upon pasture, there is due, at the expiration of the year, a *Zakât* of *one goat*; and this *Zakât* suffices for any number from *forty* to *one hundred and twenty*: and if the number exceed *one hundred and twenty*, a *Zakât* of *two* goats is due from *one hundred and twenty-one* to *two hundred*: and if it exceed *two hundred*, a *Zakât* of *three* goats is due from *two hundred and one* to *three hundred and ninety-nine*: and if it amount to *four hundred*, the *Zakât* is *four* goats: and beyond *four hundred* the *Zakât* is *one* goat for every *hundred*; the prophet having thus ordained, and all the doctors uniting in this opinion. It is also to be observed, that the same rules of *Zakât* are applicable to *sheep* as to *goats*, the term *Ghannem*, in the tradition, equally implying both species.

Kids or lambs are not acceptable payment unless they be above a year old;

IN the *Zakât* of goats or sheep, *Sinnees* are acceptable payment, but not *fuzzas*. This is the *Zâbir-Rawâyet*. *Sinnees* are kids which have entered on the second year; and *fuzzas* are such as have not yet

* Meaning *Persia*, or *Hindostan*.

completed their first year.—The two disciples have said that the *Zakât* may be paid with the *ƒuzzas* of sheep; and there is one opinion of *Haneefa* recorded to this effect; and the reasons are twofold; FIRST, the prophet has said, “*The Zakât upon them consists of ƒuzzas and Sinnees* ;”—SECONDLY, sacrifice is fulfilled by the immolation of a *ƒuzza*, and therefore *Zakat* may be also discharged by it. The ground upon which the *Zâbir-Rawâyet* proceeds is also twofold; FIRST, a saying of *Alee*, “*In Zakât nothing is acceptable short of a Sinnee* ;”—SECONDLY, in the *Zakât* of goats it is incumbent to give those of a middling size, and the *ƒuzzas* of sheep are not of that standard, being small; whence it is that the *ƒuzzas* of goats also are not acceptable in *Zakât*. With respect to the first reason urged by the two disciples, it may be replied, that by the term *ƒuzza*, as mentioned in the tradition, is to be understood the *ƒuzzas* of camels, that is, yearling colts: and what they say of sacrifice is no rule, as that of a *ƒuzza* is approved, (not by analogy, but) from the express words of the sacred text.

IN paying the *Zakât* of goats or sheep, males and females are equally acceptable; the term *Shât*, in the traditions, applying indiscriminately to both genders.

but males and females are equally acceptable.

S E C T. IV.

Of the ZAKÂT of Horses.

WHEN horses and mares are kept indiscriminately together, feeding for the greater part of the year on pasture, it is at the option of the proprietor either to give a *Zakât* of one *Deenâr* per head for the whole, or to appreciate the whole, and give five *Deenârs* per cent. upon the total value: and this last is the mode adopted by *Ziffer*.—The two disciples maintain that no *Zakât* whatever is due upon horses,

One *Deenâr* per head due upon horses, or five *Deenârs* per cent. on the total value.

horses, the prophet having ordained *that Mussulmans should not be subject to ZAKÂT for their horses or slaves.* Haneefa, in support of his doctrine, as above, states an ordinance issued by the prophet, in which he directed that the *Zakât* upon *ordinary* horses should be one *Deenâr*, or ten *Dirms* per head. And with respect to the ordinance above quoted by the two disciples, that applies solely to *war-horses*, and not to *ordinary* cattle.

Zakât not due upon droves consisting entirely either of males or of females.

No *Zakât* whatever is due upon a *Nisâb* of horses consisting entirely of *males*, because in that there can be no increase by breeding; and, in like manner, there is no *Zakât* upon a *Nisâb* consisting entirely of *mares*, for the same reason.—This is one tradition from *Haneefa*. There is another tradition from him, however, which says that a *Zakât* is due upon *mares* although there be no horses among them, as horses can be occasionally borrowed by the proprietor for the purpose of producing, whence increase may be had; but this is impossible with respect to droves consisting entirely of *horses*.

No *Zakât* due upon *asses* or *mules*, unless as articles of commerce.

THERE is no *Zakât* due upon *asses* or *mules*, the prophet having said, “*With respect to Zakât upon asses and mules, I have received no revelation.*” But yet, if these animals be as *articles of merchandize*, a *Zakât* is due upon them, because, in the present times, *Zakât* is imposed upon the property involved in them the same as upon any other articles of traffick.

S E C T. V.

Of the ZAKÂT of Kids, and Calves, and Camels’ Colts.

No *Zakât* due upon the young of herds or flocks until a year old.

No *Zakât* whatever is due (according to *Haneefa*) upon the young of *goats*, *kine*, or *camels*, which are under *one year*; that is to say, if a man were to purchase twenty-five camels’ colts (for instance) or
forty

forty kids, or thirty calves, and one complete year should pass from the period of possession, still no *Zakât* is due; nor does any become due, until the expiration of the term of a year after they shall have been grown up.

Abou Yoosaf holds that *Zakât* is not due upon fewer than forty kids, or thirty calves, or twenty-five camels' colts: and upon *twenty-five* camels' colts the *Zakât* is *one* colt: and there is no further *Zakât* due till the number amounts to *seventy-six*, when the *Zakât* is *two* colts; because upon *seventy-six Misnas* a *Zakât* is due of two *Binnit-liboons*: and there is no further *Zakât* till the number amounts to *one hundred and forty-five*, when it is *three* colts; because upon one hundred and forty-five *Misnas* the *Zakât* is two *Hikkas* and one *Binnit-makhâfs*. There are other traditions of the opinion of *Abou Yoosaf* herein; but the above, as being of posterior record, supercedes them.

One camel's
colt due on
25, &c.

If a person owe, as *Zakât*, a *Misna*, and it should happen that he is not possessed of one, having no cattle in his flocks but what are either *under* or *over* that description, the officer who collects the *Zakât* is at liberty either, in the *former* case, to take an animal of the under rate, and the difference in money,—or, in the *latter*, to take one of a superior sort, paying the difference of value between that and a *Misna* to the proprietor. It is to be observed that, in the latter case, no constraint is to be put upon the collector, who is at liberty to insist upon either the actual thing due, (to wit, a *Misna*,) or the value of one in money, because the acceptance of an animal of the superior sort, on the terms above stated, wears the aspect of traffick; his acceptance of it, therefore, cannot be compelled, insomuch that if the proprietor were to give him no obstruction in taking it, yet he is not considered as being seized of it; but the collector may be compelled to

Case of the
payment of
Zakât by sub-
stitution.

accept of an animal of an inferior sort, and the difference in money, inasmuch that if the proprietor merely *give no obstruction* to the officer, in thus taking the animal and the difference, he (the officer) is considered as being seized of the same; because here the transaction does not bear the aspect of *purchase* and *sale*, as the proprietor pays the inferior animal in part of the *Misna*, and consequently the difference along with it.

Substitution
of the *value*
lawful.

If a proprietor, in *Zakât*, should, in lieu of the actual thing due, pay the value in *money*, it is approved, according to our doctors; and the same holds good in *expiation*, or in the payment of *Sadka-fittir*, or *Tythe*, or the *fulfilment of a vow*. *Shafëi* maintains that this is unlawful, because it is not lawful to exchange, for a substitute, any thing specified in the sacred writings; as in sacrifice (for instance) where a substitution of *value* for the *victim* is illegal. The argument of our doctors is, that God has himself ordained *Zakât*, and has directed the same to be distributed in alms to the poor, which plainly indicates that the intent of the institution is merely that the poor should derive a subsistence from it, so as that their wants may be thereby relieved; and to effect this the value will answer equally well with the specific animal, wherefore the substitution of the value in payment of *Zakât* is legal, the same as in payment of *Jazzeeyat*, or capitation-tax: but this reasoning does not apply to *sacrifice*, as that is an act of piety, to the fulfilment of which the shedding of the blood of the victim is essential, wherefore no conclusion can be drawn from this instance, as there is no analogy between the two cases.

Labouring
cattle exempt
from *Zakât*.

CAMELS and oxen kept for the purpose of *labour*, such as carrying burthens, drawing the plough, and so forth, are not subject to *Zakât*; neither is any *Zakât* due upon them where they are fed one half of the year or more upon forage. *Mâlik* controverts this doctrine:

trine: but the arguments of our doctors herein are threefold; FIRST, the prophet has expressly ordained that these two species of cattle should be exempted from *Zakât* under such circumstances; SECONDLY, the cause of the obligation of *Zakât* consists in *the possession of increasing property*, and the increase of cattle can be conceived only under two circumstances, that is, their being either kept in pastures*, or for the purpose of traffick, neither of which is the case with the cattle now under consideration; THIRDLY, in cases where the cattle are fed upon forage, the keeping of them is attended with great expence, a circumstance which more than counterbalances any advantage to be derived from their breeding in such a situation, and therefore *virtually* prevents increase, although it may not *actually* do so.

THE officer, in collecting *Zakât*, is not at liberty either to insist upon the *best* or to accept of the *worst* sort of the property collected upon, but must take what is of a medium standard, because the prophet has so ordained it; and also, because, in confining the *Zakât* to property of a medium value, regard is had at once to the interest of both the parties concerned, to wit, the *poor* and the *proprietor*.

Must be paid
in animals of
a *medium*
value.

WHOEVER is possessed of a *Nisâb* property, and obtains an addition of the same sort or species within the year, must add it to the *Nisâb*, and pay *Zakât* upon the whole. *Shafei* objects to this, maintaining that the supervenient acquisition should not be added to the first *Nisâb*, because the property of which that consists is original and independent with respect to *propriety*, and is therefore so with respect to *Zakât* likewise: contrary to acquisition by *breed* or *profit* obtained within the year, that being a *dependant* only of the original property,

Law respect-
ing property
acquired in
the interim
between the
payments.

* Meaning, that where the cattle are suffered to go at large, as in pastures, the males have free access to the females, which produces breed.

and, as such, not to be confounded with it. To this our doctors reply, that the reason for supervenient acquisition, by brood or profit, being added to the *Nisâb*, is homogeneity in the subject of it; since, where the original and supervenient property are of the same species, it is not easy to discriminate precisely between them, and consequently difficult to ascertain the *Hawlân-Hâwl* with respect to any species of profitable acquisition arising from original property; and, as the *Hawlân-Hâwl* is regarded only for the sake of convenience, it therefore appears that homogeneity in the subject is a sufficient reason for the supervenient acquisition being added to the original property; and this reason exists in the present case.

Rules re-
specting the
Afoo.

THE two *Sheikhs* hold *Zakât* to be due upon the *Nisâb* only, and not upon the *Afoo**; but *Mohammed* and *Ziffer* maintain it to be due upon both the *Nisâb* and the *Afoo*, that is, upon the whole; the result of which difference in opinion is that, if the *Afoo* were to perish, and the *Nisâb* to remain, then, according to the two *Sheikhs*, the whole *Zakât* that had been before obligatory still remains due; but, according to *Mohammed* and *Ziffer*, an adequate proportion of *Zakât* drops: and, in support of this latter opinion, *Mohammed* and *Ziffer* argue that *Zakât* is due as an acknowledgment for the blessings of Providence, and the *Afoo* is a blessing the same as the *Nisâb*; that is to say, they are both equally blessings, wherefore *Zakât* is equally due upon both. The argument upon which the *Sheikhs* support their opinion is twofold: FIRST, the prophet has expressly said “The ZAKÂT upon five camels is one goat, and ZAKÂT is not due upon any further number till it amount to ten;” and in like manner the prophet has ordained the *Zakât* upon every *Nisâb*, and forbidden

* *Afoo* literally means *exempt*. In the *Zakât* of cattle it is used to express any intermediate or odd number between one *Nisâb* and another, as between twenty-five and thirty-six camels for instance.

it upon the *Afoo*; SECONDLY, the *Afoo* is a dependant of the *Nisab*, whence, if a part of the whole *Nisab* and *Afoo* were to perish, the loss would be first calculated upon the *Afoo*, as being the dependant part; as in a contract of *Mozâribat*, where any accidental loss is first calculated upon the *profit*, and not upon the *capital*: and on this ground it is that *Haneefa* accounts the loss upon the *Afoo* to the extent thereof, and beyond that upon the *Nisab* property of the first (or highest) denomination, and beyond that upon the *Nisab* of the next lower denomination, and so on to the *last* (or lowest) denomination of *Nisab*; because the *Nisab* of the highest denomination is the principal, to which all the inferior *Nisabs* are dependants; and, according to *Abou Yoosaf*, the loss is calculated first upon the *Afoo*, and beyond that upon all the degrees or descriptions of *Nisab* collectively.

* IF the rebels or schismatics overcome any particular tribe of Musulmans, and take from them the *Zakât* of their cattle, when these rebels are driven away, the rightful *Imâm* must not impose another *Zakât* upon that tribe, because it appears from the above circumstance that the *Imâm* has not protected them, and the right of imposing *Zakât* appertains to the *Imâm*, in virtue of the protection he affords; the learned however have decreed, upon this case, that the tribe in question should repeat their *Zakât*, and pay it a second time, but not their *Tribute*, because the latter is declared, in the sacred writings, to be applicable to the use of the warriors who fight their enemies; and hence rebels may be considered as an object of its application, they also answering this description; whereas the only object of the application of *Zakât* is the *poor*, and rebels do not be-

Case of *Zakât* being levied by the *Rebels*, or *Schismatics*.

* This and the next following case are merely *local* in their application, and allude to the state of Arabia, shortly after the establishment of *Islamism*. The *Schismatics* were those who refused to submit to the law of the Prophet; whilst others (like the tribe of *Toglib*, mentioned in the next case,) submitted and paid tribute.

flow

show what they may levy upon the tribe, under that denomination, to the use of the poor; wherefore it is necessary that the tribe should again pay *Zakât*, so as that it may be applied to its proper object; but not their *Tribute*. Some of our doctors say, that if the aforesaid tribe, at the period of paying *Zakât* to the rebels, intend in so doing to give them *alms*, in this case *Zakât* drops with respect to that tribe, and there is no necessity for their afterwards repeating it; and the giving of *Zakât* to any tyrant or plunderer whatever is capable of this construction, because persons of this description, whatever wealth they may be *apparently* possessed of, are yet actually *poor*, on account of the retribution, which lies against them hereafter: but the former doctrine (that the tribe should repeat their *Zakât*) is preferable to this, because here the *Zakât* is rendered and applied, *a certiori*.

How far the
Toglib tribe
are subject to
Zakat.

THE *Zakât* of cattle is not incumbent upon an infant of the tribe of *Toglib*;* and whatever is incumbent upon the *men* of that race is so upon the *women* also, because peace was made with them upon those terms, “*that they should pay, of all publick imposts, double what was paid by Mussulmans:*” now the Mussulman women are subject to *Zakat*, and it follows that the women of the *Toglib* race are so in a *double* proportion; but no *Zakat* whatever is required of infant Mussulmans, wherefore the infants of the aforesaid tribe are not subject to it.

An accidental
destruction of the
property in-

If the property be destroyed, without being consumed by the proprietor after *Zakât* has become due, (that is to say, after the completion of *Hawlân Hâwl*,) the *Zakat* upon it drops. *Shafëi* has

* One of the Arabian tribes, who refused to embrace the faith, but agreed to pay tribute to the Prophet. The tribe itself is supposed to be long since extinct; but the laws to which the people of it were subject are applicable, in general, to all infidel tributaries.

saïd

saïd that if the property be destroyed after the proprietor has been enabled to pay the *Zakât* upon it, either by the claimant making his demand of *Zakât*, or by the proprietor finding a claimant, although such claimant should not have demanded it, in this case the proprietor is responsible for the *Zakât*, because it was due from him, and he did not pay it, although it was in his power to have done so; moreover, if he should not pay the *Zakât* upon the requisition of the claimant, this circumstance stands as a *destruction* of it on his part. The argument of our doctors is, that the *Zakât* due is a *portion* or *part* of the *Nisâb*; and, as its destruction is involved in that of the *Nisâb*, it drops of course, the same as where a slave commits a *Janâyat* [offence against the person], in which case it is incumbent upon the proprietor to make over that slave to the *Walee-Janâyat*, or person intitled to the composition; but, if the slave should die or be lost in the interim, the proprietor is no longer responsible for the transfer of him, and that consequently drops; and, with respect to the *second* argument of *Shafëi*, it may be replied, that no person can be considered as the *claimant* of *Zakât* except a pauper whom the proprietor may have specified as the object of its application, and the case does not suppose the requisition to be made by such an one. But if the collector demand the *Zakât*, and the proprietor neglect payment, and the *Nisâb* afterwards perish, there are various opinions among the Haneefite doctors, some alledging that the proprietor of the destroyed *Nisâb*, in that case, still remains responsible for the *Zakât* due upon it; whilst others maintain that, in this instance also, he is not responsible, because the *Nisâb* does not here appear to have been destroyed by him.

duces an exemption from *Zakat*.

IF, after *Hâwlan Hâwl*, a portion of a *Nisâb* (such as a *third* for instance) should be destroyed, the claim of *Zakât* is proportionably destroyed,

A partial destruction includes a pro-

portionable
exemption.

destroyed, in the same manner as where the whole *Nisâb* is destroyed; in which case the whole *Zakât* drops.

Zakat may
be paid in
advance.

If the proprietor of a *Nisâb* should pay the *Zakât* upon it, before *Hawlân Hâwl*, it is lawful, because he has here paid it during the existence of the creative principle of obligation to *Zakât*, which is understood in his possession of a *Nisâb*; this payment, therefore, is approved, the same as a discharge of a debt, under the existence of its cause; as where a *Mohrim*, for instance, pays expiation for wounding game whilst the animal is yet alive. This doctrine is controverted by *Mâlik*.

If the proprietor of a single *Nisab* should, before *Hawlân Hâwl*, make payment of *Zakât* upon the same for a certain number of years in advance, or should pay a *Zakât*, upon a certain number of additional *Nisâbs*, it is approved, because the first *Nisâb* is the *original* with respect to the cause of the obligation of *Zakât*, and any thing beyond that is as a *dependant*.

CHAP. III.

Of ZAKÂT from Personal Effects.

SECT. I.

Of the ZAKÂT of Silver.

No *Zakât*
due on less
than 200
dirms.

No *Zakât* is due on less than two hundred *Dirms**, because the prophet has ordained that there shall be no *Zâkat* upon fewer than five *Awkiyat*†, and an *Awkiyat* is valued at forty *Dirms*.

* A silver coin, value about two pence sterling.

† An ounce of silver; or a silver coin of that weight, value between six and seven shillings.

THE *Zakât Nisâb* of silver is two hundred *Dirms*: and if a man become possessed of two hundred *Dirms*, and the *Hawlân-Hâwl* be completed, the *Zakât* due upon it is five *Dirms*, because the prophet wrote to *Maaz*, saying, “ Upon two hundred DIRMS take a “ ZAKÂT of five DIRMS; and upon twenty MISKALS of gold, half a “ MISKAL.”—

and upon 200
at the rate of
two and an
half per cent.

No *Zakât* is due upon any excess above the two hundred *Dirms*, till such excess amount to *forty*, upon which the ZAKÂT is one *Dirm*: and upon every succeeding forty the same *Zakât* is due, but not on fewer than forty. This is according to *Haneefa*. The two disciples have said that a proportionate *Zakât* is due on whatever excess may occur over and above two hundred *Dirms*; and *Shafëi* coincides in this opinion, because in the traditions of *Alee* it is related that the prophet has so ordained it; and also, because *Zakât* is rendered as a return of gratitude for the blessings of Providence; and the reason why it is expressed as a condition, in the beginning of this book, that the property, in order to cause an obligation of *Zakât*, amount to a *Nisâb*, is that the proprietor may thence appear to be in easy circumstances; but where, from his being possessed of a *Nisâb*, this appears to be already the case, it is not requisite that any excess amount to a *Nisâb*; and hence *Zakât* is due upon such excess proportionably, whatever its amount may be.

and at the
same rate
upon every
forty above
two hundred.

OBJECTION.—This would lead to a conclusion that, in the *Zakât* of cattle, the same is due upon any excess under a *Nisâb*; whereas the rule is otherwise, no *Zakât* whatever being due upon such excess, since that is considered as *Afoo*, or *exempt*.

REPLY.—Such is the conclusion from analogy; but the excess in cattle is made *Afoo*, because, if a proportionate *Zakât* were to be levied upon it, this would necessarily induce a copartnership in the subject, by the proprietor admitting the *claimant* of *Zakât* to a share in it:—for instance, the *Zakât* upon *twenty-five camels* is one year-

ling colt ; now, if *Zakât* were due upon excess camels, and the drove consist of *twenty-six* there would be a *Zakât* upon this *one* excess camel of the twenty-fifth part of a yearling colt, which is not payable in any way than by admitting the claimant to a partnership in such colt ; and this partnership, being *compulsive*, is *illegal* ; but *plate* or *cash* not being liable to the same objection, a *Zakât* is due, proportionably, upon any excess whatever over *two hundred Dirms*.

Rules respecting the calculation of a *Nisâb* of silver.

It is to be observed that the *Nisâb* of silver of two hundred *Dirms* is calculated by the *Wazn-sebbâyat*, or septimal weight (which is in the proportion of ten *Dirms* to seven *Miskals*), as this was the weight used in the tribunal of *Omar*, and that of the *Dirm* is thence established.

THOSE *Dirms* in which silver predominates are to be accounted as silver ; and the laws respecting silver apply to them, although they should contain some alloy ; and the same rule holds with all articles whatever falling under the denomination of *plate*, such as cups, goblets, and so forth ; but *Dirms*, in which the alloy predominates, are not to be accounted as *silver*, but only as *trading property*, estimable by its real value, to which alone regard is to be had ; and accordingly, if the value of them amount to a *Nisâb*, they are subject to *Zakât*, provided there be an intention of trafficking in them ; as is the condition with respect to all other chattels. In all *plate*, therefore, in which the alloy prevails, respect is to be had to the intention of trafficking in it, excepting where the silver contained in it amounts to a *Nisâb*, in which case the intention of trade is not a condition, nor is any regard paid to the estimated value, because in actual silver no respect is had to either of these. The above case is thus stated ; because money always contains a small portion of alloy, as pure silver is unfit for coinage, since, without being hardened by an addition of some baser metal, it cannot retain the mint impression ; but the alloy is

is generally in the smaller proportion; regard therefore is had to excess; that is to say, if the proportion of *silver* be the greater it is accounted as silver, but not if the *alloy* be in greater proportion, (that is, in a proportion above a moiety of the whole weight.)

S E C T. II.

Of the ZAKÂT of Gold.

THERE is no *Zakât* on fewer than twenty *Miskals* of gold, this sum being the smallest that constitutes a *Nisâb* in that metal; and the *Zakât* upon twenty *Miskals* of gold is one half *Miskal*, when the *Hawlân-Hâwl* therein becomes established, on the authority of the tradition before quoted.—By the *Miskal* * here mentioned, is to be understood that which weighs in the proportion of seven *Miskals* to ten *Dirms*; and the *Miskal* consists of twenty *Kerât* †, and the *Kerât* of five grains.

No *Zakât* due upon less than 20 *Miskals*; and upon 20 at the rate of two and an half per cent.

WHEN the quantity of gold exceeds twenty *Miskals*, on every four *Miskals* of such excess a *Zakât* of two *Kerâts* is due, because the *Zakât* due is a fortieth of the whole, and two *Kerâts* are the fortieth of four *Miskals*; and upon any excess short of four *Miskals* no *Zakât* is due, according to *Haneefa*. The two disciples hold that on every excess there is a proportionable *Zakât*, the same as mentioned in the preceding section; and the foundation of their difference in opinion is also the same here as was there recited, to wit, *Haneefa* holds that broken numbers are free of impost, whereas the two disciples maintain the contrary opinion. The ground upon which *Haneefa* proceeds, in the rule here recited, is this: the legal value of a *Deenar* is ten *Dirms*, and a *Deenar* and *Miskal* are of the same weight; the value of four *Miskals* in gold is therefore *forty Dirms*; and consequently no

and at the same rate upon every four above twenty.

* A dram and a half: also a *coin* of that weight.

† A *Carat*; the twenty-fourth part of an ounce.

Zakât is due upon fewer than four *Miskals*, since these stand the same as forty *Dirms*: and it has been already shewn that nothing short of forty *Dirms* is subject to *Zakât*, on account of the tradition of *Amroo Bin Khurrm*, as before recited.

General rule.

ZAKÂT is due upon gold and silver bullion, which is termed *Tebbur*: and in like manner upon ornaments or utensils of gold or silver, whether the use thereof be allowable (such as *rings*, and so forth) or otherwise *.—*Shafëi* maintains there is no *Zakât* upon the gold or silver ornaments of women, nor upon rings worn by men, the use of which is allowable, and which are therefore the same in this respect as clothing or articles of apparel.—The argument of our doctors is, that the cause of the obligation to *Zakât* still continues in the present case:—moreover, articles of gold and silver do, in their own nature, afford an argument of increase in the subject, since these metals are brought into use principally for the purpose of facilitating exchanges by traffick, which affords an argument of increase; and it is the *virtual* and not the *actual* increase in any subject that creates the obligation to *Zakât* upon it; contrary to the case of articles of apparel, which afford no argument or probability of increase.

S E C T. III.

Of the ZAKÂT of personal Chattel Property†.

Zakât due
upon all
merchandise.

ZAKÂT is due upon articles of merchandize, of whatever description, where the value amounts to a *Nisâb* either of gold or silver, because

* This alludes to prohibitions against the use of the precious metals in certain articles of personal ornament and household furniture, which have been at various times issued by the prophet and his followers as checks upon luxury. (See *Abominations*.)

† In the original, personal *chattels* are expressed by the terms *Rakht* and *Matâ*, of which it is not easy to give any literal translation; they express, in general, all articles which appertain to personal estate or effects [*Mâl*]: articles of gold and silver, it is true, do also fall

because the prophet ordained that articles of merchandize should be appraised, and that a *Zakât* be paid on the same, in the proportion of five *Dirms* upon every two hundred *, as the proprietor has prepared and keeps them with a view to increase, so that they resemble gold and silver, which the law holds to be kept for the same purpose ; and, as *Zakât* is due upon the latter, it is in like manner due upon the former : but the intention of trade in these articles is made a condition, in order that it may be ascertained that they are kept with a view to *increase*. *Mohammed* says that, in estimating the value of articles of merchandize with a view to the imposition of *Zakât* upon them, they should be resolved into such *Nisâbs* as may be most advantageous to the poor ; thus if, in valuing an article by *Dirms*, it would amount to a *Nisâb* of *silver*, and in valuing the same by *Deenars*, it would *not* amount to a *Nisâb* of *gold*, it must be estimated by *Dirms* ; and, *vice versa*, if its value should appear to amount to a *Nisâb* of *gold*, it is to be estimated by *Deenars*.—The compiler of the *Hedâya* observes that there is one opinion recorded from *Haneefa* to the same effect. *Mohammed* again, in the *Mabsoot*, has said that the proprietor of the article has it in his option to estimate it at whatever species of *Nisâb* he pleases, because gold and silver are standards, and in estimating the value of effects are both equally proper.—It is recorded as an opinion of *Abou Yoosaf*, that an article should be estimated by that with which it was purchased : thus, if it has been purchased with *Dirms*, it is to be appraised in *Dirms* ; and if with *Deenars*, it is to be appraised in *Deenars* : and if it should have been purchased with any other than either of these, it is to be estimated in money of the most general currency.—It is on the other hand recorded, as an opinion of *Mohammed*, that whatever the purchase may have been made with, the estimate is to be in *current money*, as

Mode of ascertaining the *Nisâb* of merchandize.

fall under this general description of *Rakht* and *Matâ* ; but they are introduced under a different head, as the laws of *Zakât*, with respect to them, are of a peculiar nature, and such as do not affect or apply to other articles of personal property.

* To wit, at the rate of two and an half per cent.

above,

above, in the same manner as that of property forcibly seized, which is thus estimated in all cases.

Property not exempted by an intervening defect in it.

IF a *Nisâb* be complete in the beginning of the year, and also at the end, *Zakât* does not drop on account of its having been defective at any time *within* that period; because it is difficult to ascertain its completeness through the intermediate space; moreover, in the commencement of the year its completeness is requisite, in order to the establishment of the cause of obligation, and so also at the *close* of the year, in order to *Zakât* becoming due; but it is not so within the interval.

Other chattel property may be united with money or bullion to form a *Nisâb*:

THE value of personal effects, or other articles, may be united with gold or silver; that is to say, if (for instance) the proprietor should have effects estimated at the value of one hundred *Dirms*, and also one hundred *Dirms* in money, the value of the effects, as above, must be added to the one hundred *Dirms*, so as that the whole may make one *Nisâb*; and *Zakât* is due thereon, because the obligation to *Zakât*, in such property, is occasioned by the circumstance of its being kept with a view to traffick, although the shape in which it is so kept be different with respect to each of the two descriptions of it, traffick in *chattels* being established by the act of the individual, but that in *money* by the construction of the law.

and also silver with gold.

GOLD and silver may in the same manner be united, both being in effect of one nature, as standards of estimation, and the possession of each equally causing the obligation to *Zakât*.

GOLD and silver may be united, according to *Haneefa*, in respect to their *value**; but, according to the two disciples, in respect to their

* That is to say, may be both resolved into one *Nisâb*, not by the respective weight of each, but by a general valuation of both.

parts: and the consequence of this difference of opinion is, that if a man were possessed (for instance) of one hundred *Dirms* in silver, and five *Miskals* of gold (the value of which would amount to one hundred *Dirms*), this person would be subject to *Zakât*, according to *Haneefa*, but not so according to the disciples; for these latter say that, in ascertaining the *Zakât* of gold and silver, regard is to be had to the *quantity* only, and not to the *value*; whence it is that *Zakât* is not due upon a vessel of silver, where the *weight* is short of two hundred *Dirms*, although the *value* should be to that amount, or beyond it: *Aboo Haneefa*, on the other hand, contends that gold and silver are united with each other on account of their homogeneity, which is established between them in respect to their *value*, but not in respect to their *substance*.

CHAP. IV.

Of the LAWS respecting those who come before the *Collector*.

IF a person come with his property* before the collector and say, "It is so many months since this property has come into my possession, and a year has not yet elapsed;" or, "I am indebted so and so," and make oath of the same, the collector is to credit him, and must not exact any thing, because this person stands as a defendant denying his obligation to *Zakât*; and the declaration of a defendant, when supported by his oath, must be credited. So also, if a person were to declare that he had already paid the *Zakât* upon such property to a former collector, his declaration must be credited, because the collector, in taking *Zakât*, acts merely as a *Trustee*, and

Declarations
respecting
property,
when made
upon oath, to
be credited:

* Meaning *merchandise*, but not *cattle*; and the word bears the same sense throughout this chapter.

the *Zakât* comes to and remains with him as a *deposit*; and the declaration of the above person amounts only to his having deposited the trust in its proper place, and this is to be credited, provided there should have been another collector there within that year; but if, on the contrary, there should have been no other collector on that station within the current year, the affirmation and oath are not to be credited, since, in this case, the falsehood is manifest. And, in like manner, if the proprietor were to declare that he had already paid the *Zakât* upon such property in his own city, by having there bestowed the same upon the poor, his declaration must be credited, because a proprietor, whilst in his own city, is entrusted with the payment and distribution of the *Zakât* upon his property, and he continues to be so until he comes forth and brings his property before the collector, when the authority for levying *Zakat* rests with the latter, as the property and the proprietor do both then come within his jurisdiction *.—In short, in all these four instances, the declaration of the proprietor is to be credited. And in the same manner the declaration of a proprietor, respecting *Zakât* upon cattle, is to be credited in the three first instances, but it is not so in the fourth, although he should confirm his attestation by an oath. *Shafëi* maintains that it is to be credited here also, as the proprietor appears, by the tenor of his declaration, to have rendered the right duly to the claimant.—In opposition to this, our doctors argue that the right of exacting the *Zakât* upon cattle appertains solely to the *Sultan*, and the proprietor is not at liberty to preclude the *Sultan's* right: contrary to the case of property of other nature, such as is termed, in the language of the law, *Bâtena* [*internal*, or *domestick*,] the rendering of the *Zakât* upon which is committed to the proprietor.—It is to be observed that some have said, respecting cattle, that the *Zakât* which was paid by the proprietor himself in the first instance is the true obligatory *Zakât*, and that whatever may be afterwards exacted of him

* This comment upon the law (as in many other instances) has reference to some local customs or circumstances which cannot now be ascertained.

under that denomination, is consequently an oppression; whilst others maintain that this latter is to be considered as the obligatory *Zakât*, and the former to be held as an act *Nisf*, or *gratuitous*; and this last doctrine is approved.—Now a question here arises, as the assertion of the proprietor is to be credited, whether he ought to produce his writing of discharge [voucher] or not:—*Mohammed*, in the *Jama Sagbeer*, has not required this as a necessary condition; but in the *Mabsoot* he has made it a condition; and this latter opinion (according to a tradition of *Hoosn*) is that of *Aboo Haneefa*. The principle of this doctrine is, that as the proprietor pleads a discharge, and as he possesses a voucher of such discharge, he ought consequently to produce it; whilst the principle of the doctrine maintained in the *Zâbir-Rawâyet* is that as one writing resembles another writing, they are not admitted as proofs.

IN whatever instance the declaration of a Mussulman, with respect to *Zakât*, is to be credited, that of a *Zimnee* * must be so likewise, because a *Zimnee* is subject to double the impost of a Mussulman; and hence all the conditions which are to be regarded, with respect to the property of the latter, must be equally so with respect to that of the former.

declarations
of *Zimnees* to
be credited:

IF an alien appear before the collector of the *Sultan* with articles of merchandize, it behoves that officer to exact from him what is usually exacted of aliens, without paying any regard to his declarations in those points in which the declarations of a Mussulman or *Zimnee* are to be credited, although he should swear to the same, excepting where he declares, concerning his female slaves, that those slaves are his *Am-Walids* †; for, in all other species of property, his affirmation is not worthy of attention, because the impost which is thus levied

but not those
of *aliens*.

* An infidel subject of the Mussulman government.

† Slaves who have born children to him.

upon him is not in fact *Zakât* *, but rather a contribution exacted as a return for the protection he receives, and which is requisite for the safeguard of whatever he may possess; it is therefore proper to take from him the impost usually levied upon aliens, except where he declares, as above, with respect to his female slaves, that they are his *Am-Walids*, which declaration must be attended to and credited; because, if an alien were to declare, concerning any other persons who accompany him, that "they are his children," his declaration is approved; and so, in like manner, with respect to his female slaves, as the rights of the *Am-Walid* are derived from the establishment of the child's descent, and consequently the female slaves do not appear to be *transferable property*; and nothing but transferable property is an object of taxation.

Proportion
levied upon
merchandise.

FROM a *Mussulman* is taken the fourth of the *tithe* of his property; and from a *Zimnee* the half of the *tithe*; and from an alien the *tithe*; Omar having instructed his collectors to this effect.

Zakât to be
levied on the
property of
aliens, to the
value of fifty
Dirms, or
upwards.

IF an alien should come before the collector with property to the amount only of *fifty Dirms*, nothing whatsoever is to be exacted of him, except where aliens exact contribution upon an equally small property of mussulmans; in which case a similar impost must be laid upon this amount, the property of an alien, because what is taken from aliens is merely in the way of *reciprocity*: contrary to the case of *Mussulmans* or *Zimnees*, as what is levied upon them is in fact *Zakât*, either single or twofold, whence it is indispensable that the property with them amount to a *Nisâb*.—This is the doctrine of the *Jama Sagbeer*. In the *Mabsoot*, under the title *Zakât*, it is written that if the property of an alien should be *small* (that is, short of a *Nisâb*,) nothing whatever is to be exacted of him, let the custom of aliens, in this respect, be what it may, because a proportion of pro-

* Because, as being an act of piety, an infidel is held to be incapable of paying *Zakat*; wherefore it cannot be considered in that sense, although it be exacted under that denomination.

perty not amounting to *Nisâb* is invariably to be considered as *Afoo*, or exempt; and also, because a trifle of this sort is not supposed to stand in need of the state's protection, as travellers must necessarily carry with them small sums for the purpose of expences, and robbers do not pay any attention to such trifles, not considering them objects of their pursuit.

If an alien come before the collector with two hundred *Dirms*, and it be uncertain what tax foreigners levy upon a similar property of *Mussulmans*, in this case a *tithe* is to be taken; and if it be known that foreign states exact only a *twentieth* or a *fortieth*, a similar proportion is to be taken; but if it be known that they take *the whole*, yet the *Mussulman* collector must not act accordingly, because this is an act of rapine. And if it be known that they take nothing of the *Mussulmans*, it is then proper that nothing be taken from them, in order that the *Mussulman* merchants, travelling into foreign countries, may remain free of impost; and also, because where foreign states observe kindness towards *Mussulmans*, and exact nothing of them, it is requisite that nothing be exacted of them in return, as it behoves the *Mussulmans* to preserve a character of benevolence towards all men.

Proportion to
be levied
upon the
property of
aliens:

If an alien come before the collector, and the latter exact the *tithe* of him, and he should again pass near the station of the collector, yet nothing more is to be exacted till the completion of the *Hawlân-Hâwl*, because, if the *tithe* were to be repeatedly levied within the year, the property would be *annihilated*, and the impost is laid for the purpose of *protecting* the property; moreover, the protection which is first granted continues until the beginning of a new year, when the *Amân*, or protection, commences *de novo*, because it is not permitted to an alien to remain in a *Mussulman* territory beyond the space of a year. But the tax may be again demanded of him at the expiration of the *second* year, as this does not tend to annihilate his

must not be
exactd re-
peatedly.

property.—What is here advanced proceeds upon a supposition that the alien has not returned into his own country within the period of the year, after his payment of the *tithe*, as aforesaid: but if he should return thither, it is to be again exacted of him upon his re-entering the *Mussulman* territory, even though he were to go there on the very day of payment, and to come again into the *Mussulman* territory on the same day, because every time he thus returns into the *Mussulman* territory, he returns under the virtue of a new protection; moreover, the repetition of exaction upon his return cannot be considered as tending to annihilate his property, since on every return he is supposed to acquire a profit.

Zakât-tithe
to be levied
on wine.

If a *Zimmee*, or infidel subject, pass the station of a collector with wine and pork, the collector is to levy a *tithe* upon the former article, but not upon the latter. By levying a *tithe* upon the wine, is to be understood (*not* upon the *actual article*, but) upon the *estimated value* of the article. The distinction here made between wine and pork, is taken from the *Zâbir-Rowâyet*.—*Shafëi* says, that nothing whatever should be levied on either pork or wine, neither being legally subjects of estimation. *Ziffer*, on the other hand, argues that it should be levied equally upon both, as both do equally constitute property among *Zimmes*. *Aboo Yoosaf* also says that the tax should be levied upon both, provided that they be found together upon the *Zimmee*; but possibly he is here to be understood as making the pork an appendage to the wine, whence it is that he adds “if the *Zimmee* were to come before the collector with either wine or pork, singly, the tenth would be levied on the *former*, but not upon the latter.”—The reasons upon which the *Zâbir Rowâyet* proceeds, in this case, are twofold; FIRST, the estimated value of a thing which falls under the description of *Zooâtal-Keem* stands as the identical thing itself, and pork is of this class; whereas the value of an article belonging to the class of *Zooâtal-Imfâl* does not stand in place of the identical articles, and wine is of this description; SECONDLY, the right of exacting the tenth is vested in the

the collector in consequence of the protection afforded by the state; and a *Mussulman* has a right to take measures for the preservation of his wine, for the purpose of making vinegar of the same, whence it is also lawful for him to protect the wine of a *Zimmee*; whereas he is not permitted to take any of his pork, insomuch that if a *Zimmee*, being possessed of pork, were to be converted to the faith, it would be incumbent on him to destroy it or throw it away; and a *Mussulman* not being allowed to take care of his *own* pork, it follows that he is not competent to the protection of the pork of *others*; and hence the state not being considered as affording protection to the pork of a *Zimmee*, no tax can be levied upon it.

IF a boy or a woman of the *Togbleb* tribe pass the station of a collector, with property, nothing is to be taken from the former, but he must exact from the latter the usual proportion of persons of that tribe, according to what is said concerning the *Zakât* of cattle.

IF a person come to the collector with one hundred *Dirms*, declaring that he has another hundred at home, and that the *Hawlân-Hâwl* has elapsed, yet the collector is not at liberty to take *Zakât* either upon those hundred or upon the other; because the one does not come under his protection, and the other is short of a *Nisâb*.

IF a person come to the collector with two hundred *Dirms*, which are with him as a *Bazât*, the collector must not impose any *Zakât* upon it,—because this person is not empowered by the actual proprietor to pay *Zakât*: and so also, if that property were in his hands in the way of *Mozâribat*.—This is the doctrine of the two disciples; and *Haneefa* has also subscribed to it; and the reason upon which it is founded is that the *Mozârib* is neither the actual proprietor, nor the representative of the proprietor, with respect to the payment of *Zakât*; wherefore *Zakât* is not to be required, except where the *Mozârib*, by the nature of the contract, derives such a proportion of profit from the

No *Zakât* to be levied on *Bazât* or *Mozâribat* property.

the capital stock entrusted to him as amounts to a *Nisâb*; in which case a proportionable *Zakât* must be levied, as he is the actual proprietor of such proportion.

Mazoon slaves
subject to it,

If a *Mazoon* slave, not indebted to any person, come before the collector with two hundred *Dirms*, the *Zakât* must be levied.—*Abou Yoosaf* says, that it is not known whether *Haneefa* ever retracted this opinion, and delivered another (that the collector should *not* levy *Zakât* upon a *Mazoon*) or not; but from his subscribing to the opinion of the two disciples in the preceding case, (to wit, that no *Zakât* is to be levied upon a *Mozârib*,) it may be presumed that he has also agreed that none is to be levied upon a *Mazoon*, as *he* is not the proprietor, but his *Master*, the former having only a power of transaction, with respect to the property in question, so that he stands in the same predicament with a *Mozârib*.—Some have said, that between a *Mazoon* and a *Mozârib* there is this difference, that the former transacts with the property on *his own* account, and hence is subject to its obligations; for, as he cannot have recourse to his master, but may be sold, in order to the fulfilment of such of its obligations as he is legally liable to, it follows that he *does* stand in need of protection for it upon *his own* account: contrary to a *Mozârib*, for he manages the *Mozâribat* stock in the manner of an *agent*, and hence whatever may attach to him in the obligations thereof he takes again from the proprietor, wherefore the owner of the property is the person who requires protection for it: and there thus appearing an essential difference between a *Mazoon* and a *Mozârib*, no inference can be drawn of *Haneefa's* opinion respecting the former, from what he has conceded concerning the latter.—It is to be observed that if the master of the *Mazoon* accompany him, the collector must take the *Zakât* (*not* from the *Mazoon*, but) from the *master*, he being the actual proprietor; the *Zakât*, therefore, is to be taken from him, except where it appears that the slave is indebted to such an amount as comprehends the property in question; in which case no *Zakât* whatever can be required

unless accom-
panied by
their owners.

quired of the master, since (according to *Haneefa*) the master, in this circumstance, has, in fact, no actual property in the *Mazoon's* hands;—and (according to the two disciples) the right of another is connected with the property, namely, the *debt*,—and consequently no *Zakât* is due upon it, they holding that debt upon a property forbids the exaction of *Zakât*.

If a merchant, being in a country where the *Schismatics* prevail, go to a collector of the *Schismatics*, and there pay the *Zakât* upon his property, and afterwards come before a collector of the *Orthodox*, the latter may again exact *Zakât* of him, because, in going before a collector of the *Schismatics*, and there paying *Zakât*, he was in fault.

CHAP. V.

Of Mines and buried Treasures.

THERE are three legal terms which particularly belong to these Distinctions. subjects, and which are employed for the use of distinction; *Mâdin*, *Kanz*, and *Rikaz*: by *Mâdin* is understood the place in which the *ore* or *metal* is naturally produced; by *Kanz*, treasure, or other property, buried in the ground*; and *Rikaz* applies equally to either, to *Mâdin* literally, and to *Kanz* metaphorically.

If there be discovered, in *Kherâjee* or *Asbooree* lands, (that is, Mines subject to a Zakât of one fifth. lands subject to *tithe* or *tribute*,) a mine of gold, silver, iron, lead, or

* This is a common practice in all parts of *Asia*. Treasures are hidden in the ground on the commencement of a war, or other troubles; and it frequently happens that, the depositors perishing, the treasure remains concealed, perhaps, for many years, till it be discovered by accident, and at a time when no legal claimant can be found.

copper,

copper, it is subject to a *Zakât* of one *fifth*, according to our doctors; and this *Zakât* is termed *Khams* *.—*Shafeï* has asserted that nothing whatever is due upon a mine, because it is free to the first finder indifferently, and is therefore the same as game; but yet, if the metal be produced from the mine, it is subject to *Zakât* independent of *Hawlân-Hâwl*, that having been constituted as a condition of *Zakât* merely to afford time for increase, whereas here the identical subject itself (the metal) is increase of property; wherefore the lapse of *Hawlân-Hâwl* is not in this instance required. The arguments of our doctors, on this subject, are twofold;—FIRST, the ordinance of the prophet, who directed that upon *Rikaz* there should be imposed a fifth; and the term *Rikaz* applies to mines, as was already demonstrated;—SECONDLY, the mine, as being discovered in *tithe* or *tribute* lands, must at one period have been the property of the infidels, and afterwards have fallen into possession of the *Mussulmans* by conquest, wherefore the whole falls under the description of *Ghaneemat*, or plunder; and one fifth is due upon plunder:—contrary to the case of *game*, the property in which cannot be traced to any antecedent proprietor.

OBJECTION.—If the mine be thus resolved into *plunder*, it should follow that, as such, the product of it is the common property of all the warriors.

REPLY.—The property of the warriors is established in the mine constructively, in virtue of the establishment of their property in the *surface* of the territory: but the discoverer of the mine is the *actual* *acquirer* of it; wherefore the property of the warriors is established in one fifth, their right being only *constructive*; and that of the discoverer is established in the remaining four fifths, as his right is *actual*; whence it is that those four fifths are reserved to *him*.

Case of a
mine within
a house.

IF a person discover a mine within the precincts of his own habitation, nothing is due upon it, according to *Haneefa*. The two

* Literally a *fifth*. It is elsewhere translated *double tithe*.

disciples hold that a *fifth* is due upon *that* also, in conformity to the traditional ordinance already quoted, because that applies equally to the present case. *Haneefa* argues upon this, that a mine is a constituent part of the land in which it lies, as being supposed to have been originally created with it, and nothing being due upon the ground *generally*, it follows that nothing is due upon any *particular portion* of it, (such as the mine, for instance,) because a *part* does not differ from the *whole*: contrary to the case of a *Kanz*, which is no constituent part of the soil, as not having been originally created with it, but deposited there by some person.

If the said mine be discovered, *not* actually in the house of the *finder*, but in lands, subject either to *tribute* or *tithe*, which are his own especial and exclusive property, in this case there are two opinions recorded of *Haneefa's* doctrine; one, that no *Zakât* whatever is due, any more than if the mine had been discovered within the house of the *finder*; another, that a *fifth* is due upon it: the former of these opinions is mentioned in the *Mabsoot*, and the latter in the *ʃama Sagbeer*: and the principle upon which the latter opinion proceeds is, that between a house and lands there is a manifest distinction, because the ground on which a house stands is not supposed to be any way productive of the fruits of the earth (whence it is that no tax of any kind is levied upon it, inasmuch that, if a date tree were by accident to grow within a dwelling, and to produce fruit, yet nothing is due upon the fruit,) whereas *lands*, on the contrary, as being productive, are not thus exempted from *tithe* and *tribute*, and consequently a *fifth* is due upon all mines which are found in them.

or in lands
which are
private pro-
perty:

If a person find a *Kanz*, or deposit, of buried treasure, a *fifth* is due upon it, according to the opinions of all the doctors, in conformity to the traditional ordinance already quoted, the expression there used [*Rikaz*] applying to *Kanz*. It is to be observed, however, that if the treasure in question be *coin*, bearing the impression of *Mussulman* money,

and of buried
treasures.

money, (such as the words of the *Creed**) the *Kanz* stands as a *Lookta*, or trove-property, the laws concerning which are explained elsewhere:—yet, if it bear the impression of infidel coinage, (such as the image of a saint or idol,) a *fifth* is due upon it in all cases,—that is to say, whether a person may have found the same in his own grounds, or in those of another, or in common lands which are not the property of any person; and the *fifth* is thus due upon the authority of the traditionary ordinance to which we have just referred.—It is here proper to remark, that if the treasure be found in common land, four fifths of it appertain to the finder, as having recovered it, because the other warriors had no information concerning it, and of course no share in the discovery; and consequently he has an exclusive right to it:—and the same rule obtains if it be found in appropriated land, whether such be his own property, or belonging to another, (according to *Abou Yoozaf*,) because the claim is established in virtue of *salvage*, or *recovery*, and the treasure has been recovered by the finder.—*Mohammed* and *Haneefa* maintain, on the contrary, that the treasure is the property of him upon whom the *Imâm* had bestowed the lands, originally, at the period of subjugation, who is termed the *Mokbuttut-le-hoo*, or first grantee, upon the principle that whoever has the first exclusive property in a soil is the true proprietor of whatsoever may be contained in it, although he should not have obtained visible possession thereof,—the same as where a person catches a fish with a pearl in its maw, in which case he becomes the proprietor of the pearl, although he has not actually laid his hands upon it, nor knows of its being in the fishes belly †. And it is further to

* Meaning the *Kulma*, or *Mussulman* Confession of Faith, “*There is no God but one God, and Mohammed is the prophet of God.*”

† This is a case of some curiosity, and affords an instance (among a multitude of others) of points of law adduced in elucidation of passages to which they do not appear to have any immediate reference.—From the above it appears, that if a man were to catch a fish with a jewel in its belly, and were to sell the fish, (not knowing what it contained) he would have a right to recover the jewel of the purchaser.

be observed, that if the first grantee should have sold his lands, yet he does not forfeit his right to any *Kanz*, or buried treasure, which may be afterwards discovered there, as that does not form a part of the soil, like mines, which, as being a constituent portion of it, upon a transfer by sale become the property of the purchaser. And if the *first grantee* be unknown, in this case, according to the opinion of the learned, the four fifths go to him who was the first known proprietor from the period of the establishment of the *Mussulman* faith, that is to say, him beyond whom no antecedent proprietor can be discovered.—And if the treasure should consist of coin, the impression of which is so far effaced as to render it doubtful whether it be *infidel* or *Mussulman* money, in this case (according to the *Zâbir-Rawâyet*) it is to be considered as of the *former* class: some, however, have observed that, in modern times, it is held as *Mussulman* coinage.

If a *Mussulman* go under protection into a foreign country, and there find a *Rikaz* within the house of an infidel, whether it be a *Madin* or a *Kanz*, let him deliver the same up to the proprietor, in order that treachery and breach of faith may not be induced; because whatsoever is in that country belongs of right to the people of it: but if he were to find the *Rikaz* in the open country or desert, it belongs to him, no person having any exclusive right in it so as to make his appropriation of it an act of treachery: and here the *fifth* would not be due; as treasure, thus found, does not bear the construction of *plunder*, the person who finds it standing as a *thief*, and not as a *warrior*.

Of mines or buried treasure found in a foreign country.

No *fifth* is due upon turquoises, such as are found in mountainous places; because a turquoise is a stone; and the prophet has said, “*Upon stones there shall be no KHAMS.*”

Precious stones not subject to impost.

UPON quicksilver there is due a *fifth*, according to *Haneefa*, in his last opinion recorded upon this subject: contrary to the opinion of

Quicksilver subject to impost of a fifth:—

but not pearls
or amber.

Abou Yoosaf.—Upon pearls and amber there is no *fifth* due, according to *Haneefa* and *Mohammed*.—*Abou Yoosaf* maintains that upon those, as well as upon all gems procured from the sea, there is a *fifth*; because *Omar* used to levy a *fifth* upon amber.—*Haneefa* and *Mohammed* argue, that the depths of the sea do not come under the description of parts subjugated by conquest; and hence any thing procured thence cannot be defined *plunder*, although it should consist of *gold* or *silver*; and the case of *Omar* levying a fifth upon amber existed only where that article was cast up by the sea upon the shores; and here they also coincide that the *fifth* may be levied.

IF a person find, in common ground, a deposit of chattel property, such as vessels or cloths, the same is the property of the finder; and there is a *fifth* due upon it, because this comes under the description of *plunder*, the same as gold or silver.

CHAPTER VI.

OF ZAKÂT upon the Fruits of the EARTH.

A *tithe* due
upon the pro-
duct of lands
watered by
natural
means;

UPON every thing produced from the ground there is due a *tenth*, or *tithe*, which is termed *Ashar*; whether the soil be watered by the annual overflow of great rivers, (such as the *Oxus* and *Shyhoon*,) or by periodical rains; excepting the articles of *wood*, *bamboos*, and *grass*, which are not subject to *tithe*.—This is according to *Haneefa*. The two disciples say that *tithe* is not due except upon such things as are *permanently productive**, which are subject thereto, provided the product amount to five *Wusks*, or sixty *Sâas*; and they further hold that *herbs* are not subject to *tithe*. From this it appears that the

* Such as fruit-trees.

difference of opinion between *Haneefa* and the two disciples exists with respect to two points in particular;—FIRST, the specification of the quantity as a condition; SECONDLY, that of permanency in the subject. The argument of the two disciples, with respect to the former of these, is twofold:—FIRST, the prophet has ordained that there should be no *Zakât* on less than five *Wusks*: SECONDLY, *tithe* being as *alms*, to render it obligatory it is requisite that some *Nisâb* be ascertained and established, so as to confine the contribution to the *rich*.—The argument of *Haneefa* is that the prophet ordained that *an ASHAR should be held due upon every thing produced from the ground*, which ordinance is general in its application, and without any specification of quantity; and, with respect to the ordinance quoted by the two disciples, it is to be taken as applying solely to articles of commerce; that is to say, that “*there is a ZAKÂT upon those articles, as MERCHANDIZE, where the quantity amounts to five WUSKS;*” because, in the time of the prophet, fruits were sold by the *Wusk*, and the value of a *Wusk* was estimated at forty *Dirms*, so that the value of five *Wusks* was two hundred *Dirms*, the amount of a *Nisâb* in estimated property:—and, with respect to their second argument, the obligation to *tithe* upon the fruits of the earth is connected with what it yields only, without respect to the proprietor; (whence it is that a *tithe* is due upon the product of *Wokf*-lands,) how, therefore, should any regard be had to the description of the proprietor as being *rich*? And hence also it is that *Hawlân-Hâwl* is not requisite in the present case, that having been established for the purpose of ascertaining *increase*; and the fruit of the earth does itself come under this description.—The argument of the two disciples, with respect to the second point, is, that the prophet has ordained that, “*upon vegetables*” (that is, *herbs*) *no alms are due;*” and by *alms* is here to be understood *tithes*; as *Zakât* is not forbidden here, since it is due provided the property amount to a *Nisâb*.—In reply to these observations, the arguments of *Haneefa* are twofold;—FIRST, the tradition before quoted;—and, with respect to the ordinance adduced by the two disciples,

disciples, it is to be observed, that by the term *Sadka* [alms] there mentioned, is to be understood such alms as are taken by the collector, but not that contribution which falls under the denomination of *Asbar*; and in this *Haneefa* also agrees, that the collector is not to take *tithe* from those articles;—SECONDLY, articles of product are often cultivated which are not of a permanent nature, such as *melons* and *cucumbers*; and these are the increase of the earth: and the cause of obligation to the payment of *Zakât* upon land is *increase*; whence it is that the land is subject to *tribute*, and therefore *tithe* is also due: but, with respect to the articles of *wood*, *bamboos*, and *grass*, the ground is not tilled or prepared for the cultivation of them; nay, it is usual to clear them away:—yet, if a person were to till the ground with a view to the culture of such articles, his land would be subject to *tithe*.

and an *half*
tithe upon
the product
of lands wa-
tered by *arti-*
ficial means.

LAND watered by means of buckets, or machinery, or watering-camels, are subject to *half tithe* *,—according to *Haneefa* and the two disciples:—the latter, however, coincide in this, under the restriction, conditional, that the product be of a permanent nature, and that the quantity of product amount to five *Wusks*; whereas *Haneefa* does not specify any such condition.—The reason why such lands are made subject to *half tithe* only is, that the expence of tillage greatly exceeds that of lands watered by rains, or by the periodical overflow of great rivers.

Rule respect-
ing lands
which par-
take of both
descriptions.

WITH respect to lands watered a part of the year by rivers and a part by labour, in regulating their proportion of impost, regard is to be had to the greater portion of the year; that is to say, if the land be such as is watered by rivers for the greater part of the year, the impost is a *tithe*; but, if it be watered for the greater part of the year by labour, it is only *half tithe*, or a *twentieth*.

* To wit, a *twentieth* of the whole product.

ABOO YOOSAF has said that, upon every article the amount of which is not estimated by *Wusks*, (such as *saffron* and *cotton*,) *tithe* is due, provided its value be equal to that of five *Wusks* of an article of the lowest value so estimable, (such as *millet* in the present times;) because articles, the quantity of which the law does not hold to be estimable by *Wusks*, can have their *Nisâb* ascertained only by estimation of the value; as is the case with articles of merchandize.—*Mohammed*, on the other hand, alledges that *tithe* is due upon those articles, provided their quantity amount to the number *five* of the highest standard of ascertainment of quantity with respect to each; for instance, cotton is weighed by *Mans* and *Haml*s, each *Haml* containing three *Mans*; a *Nisâb* of cotton therefore consists of five *Haml*s; saffron, on the other hand, is weighed by *Dirms*, *Astars*, *Rutls*, and *Mans*; and the latter being the greatest of these, a *Nisâb* of saffron, consequently, consists of five *Mans* weight.—The reason upon which *Mohammed* proceeds herein is, that the *Wusk* is constituted the standard of estimation of *Nisâb* in grain, &c. only on account of its being the largest standard by which their quantities can be ascertained; and the same principle operates with respect to all other articles.

TITHE is due upon honey where it is collected in *tithe*-lands. *Shafëi* maintains that nothing is due upon honey, because that is an animal production, the same as silk, which being *tithe-free*, honey is so likewise.—The arguments of our doctors are twofold: FIRST, the prophet ordained that honey should be subject to *tithe*; SECONDLY, bees collect their honey from blossoms and fruits, which articles being subject to *tithe*, it follows that *honey*, which is extracted from those, must be so likewise: contrary to the case of silk-worms, because those feed upon leaves of trees, which are not subject to *tithe*. *Haneefa* holds *tithe* to be due upon honey, whether the quantity be great or small; he not regarding *Nisâb* as essential in this article.—*Aboo Yoosaf* has reported it as an opinion of *Haneefa*, that the *Nisâb* of honey is to be ascertained by estimate, according to his general tenet upon

A *tithe* due
upon honey:

upon the subject, of *Zakāt*: and he further says, that nothing is due upon honey, unless the quantity amount to ten *Kirbs*, (a *Kirb* being fifty *Mans*,) because this was the rule by which the tribe of *Syāra* paid *tithe* on their honey to the prophet. Again, it is related as an opinion of *Abū Yūsuf*, that a *Nisāb* of honey consists of five *Mans*. According to *Mohammed* the *Nisāb* in honey is five *Sirks*, (a *Sirk* containing thirty-six *Rutls*,) because the *Sirk* is the largest standard of quantity in honey, as the *Wusk* is in grain. And the same of sugar-cane; that is to say, according to *Mohammed*, *tithe* is due upon sugar-cane where the quantity of sugar produced from it amounts to five *Sirks*.

and upon
wild honey
and fruits:

HONEY and fruits, collected in the wilderness, are subjects of *tithe*. This is the doctrine of the *Zābir-Rawāyet*. — It is related as an opinion of *Abū Yūsuf*, that nothing whatever is due upon such articles, because the occasion of obligation to *Zakāt* is the land being of a productive nature, which is not the case in this instance. — The principle upon which the *Zābir-Rawāyet* proceeds herein is, that all that is required to constitute land being productive, is the circumstance of its affording produce of any sort; and produce does appear in the articles abovementioned.

and upon all
the product
of *tithe* lands,
indiscrimi-
nately:

TITHE is due upon all the produce of *tithe*-lands indiscriminately; nor is any deduction to be made on account of the expense of men or cattle employed in tilling those lands, because the prophet has ordained that dues should be different in proportion to the difference of expence, and also that lands watered by rain shall be subject to *tithe*, and those watered by labour to *half-tithe*; wherefore the deduction of expence is needless.

and double
tithe upon
those lands
when held by
Toglebes.

UPON *tithe* lands, possessed by persons of the *TOGLEB* tribe, a twofold *Asbar*, or *fifth*, must be levied; and in this all the doctors agree. — It is recorded, however, as an opinion of *Mohammed*, that
upon

upon *tithe* lands which may have been purchased by a *Toglibee* of a *Mussulman*, a *single tithe* only should be levied; he holding that the imposition upon lands does not suffer any alteration in consequence of a transition of the property.

IF a *Zimmee*, or infidel subject, purchase land of a *Toglibee*, from which *double tithe* had used to be collected, the *Zimmee* must also pay *double tithe* upon it. In this all our doctors coincide, because it is lawful to require twice as much of a *Zimmee* as of a *Mussulman*,—whence it is that, if such an one were to come before the collector with merchandize, twice as much would be exacted of him as of a *Mussulman*. And the same rule obtains (that is to say, the same proportion of *tithe* continues to be imposed upon those lands) where a *Mussulman* purchases them of a *Toglibee*; or where a *Toglibee*, being the proprietor, becomes a *Mussulman*. *Haneefa* holds this opinion in all cases, whether the lands had originally belonged to a *Toglibee*, or the *Toglibee* had purchased them of a *Mussulman*,—for in either case the rule of double impost continues, with respect to them, where they are purchased by a *Mussulman*,—because he holds double impost upon those lands to have been already irreversibly established*, and, consequently, that this incumbrance on the lands devolves to the *Mussulman* purchaser along with the property, in the same manner as obtains in the case of a sale of *tribute*-lands. *Abou Yoosaf* maintains that, in the case here recited, a *single tithe* only is to be collected from the *Mussulman* proprietor; nor will the lands, whilst in his possession, be subject to any further impost, since the only principle upon which *double tithe* had been exacted of the *Toglibee* was the infidelity of the proprietor; and this, upon the devolving of the property to a *Mussulman*, is done away. *Abou Yoosaf*, in the *Kadooree*, has further said that (according to the *Rawâyet-Sabeeh*) the opinion of *Mohammed* is the same as that here recited. Our author, however, remarks that it is most certain that *Mohammed* coincides entirely with *Haneefa* in his

Cases of
transition of
property in
land subject
to *double
tithe*.

* By original compacts between the *Mussulmans* and *Toglibees*. This is expressed at large under the head of *Seyir*.

general principle, that the impost upon the land continues as before; but he [*Mohammed*] carries this still farther; for, as where a *Mussulman* purchases lands, subject to double impost, of a *Toglibee*, the same continues upon him, so, if a *Toglibee* were to purchase lands of a *Mussulman*, subject only to single impost, he will not have to pay any more than the said single impost, since a change in the property makes no alteration with respect to those rules to which the lands are subject.

Land devolv-
ing from a
Mussulman
to a *Zimmee*
becomes sub-
ject to tribute.

IF a *Mussulman* sell his lands to a *Christian*, who is a *Zimmee* and not a *Toglibee*, and the *Christian* aforesaid have seizin of those lands, *Haneefa* holds that *tribute* is to be collected from the same, the payment of *tribute* being a consequence of infidelity. According to *Aboo Yoosaf*, the *double tithe* collected therefrom is to be expended upon the objects of the expenditure of *tribute*, which is a mode of adjustment easier than that of thus exchanging *tithe* for *tribute*. *Mohammed* holds that the lands remain subject to *tithe* as before; and he moreover maintains that the *tithe*, collected from those lands, is to be applied to the purposes of *Zakât*.—It is to be observed that, if a *Mussulman* were to take those lands of a *Christian* in right of *Shaffa**, or if the property in them were to revert to the feller, being a *Mussulman*, on account of the sale having been invalid, in either case the lands remain subject to *tithe*, as before; in the first instance, because the *Mussulman*, as *Shafee*†, must effect his purpose (of obtaining the lands in right of *Shaffa*) by means of a contract of sale with the proprietor, wherefore the transaction here, in fact, amounts to his *purchasing* the lands; and, in the second instance, because, by the property in the land reverting to the *Mussulman* proprietor, on account of any invalidity in the sale, the case remains the same as if no transfer by sale had ever been made; moreover, the *Mussulman*'s right is in no respect affected by such invalidity, since it is proper that *that* transaction be altogether disregarded; whence the case remains the same as if no sale had ever

* Neighbourhood, or conjunction of property, which gives a right of *pre-emption*.

† The person in whom the right of *pre-emption* lies.

taken place ; and for all these reasons the land will continue subject to *tithe* as before.

IF a *Mussulman* convert the ground of his habitation into a garden, the same having been his original property, (that is to say, he being the *first grantee*,) he owes *tithe* upon it where he waters it with *tithe-water*, or *tribute* where he waters it with *tribute-water*, because this land is not, in its original description, either *tithe-land* or *tribute-land*, and in such ground the mode of watering is the standard of the expense of cultivation.

Cafe of a
Mussulman.

A *Majoos* * does not owe either *tithe* or *tribute* for his *habitation*, because *Omar* exempted *dwellings* from all impost. But, if the *Majoos* were to convert the ground of his habitation into a garden, he owes *tribute* upon the same, although he should water it with *tithe-water*, as he cannot lie under any obligation to pay *tithe*, because that bears the sense of an *oblation* and *act of piety*, of which an infidel is held to be incapable ; he is appointed, therefore, to pay *tribute*, which is conformable to his situation, as being a sort of *infliction*. Our author remarks that analogy, (from the opinion of the two disciples,) would suggest that the *Majoos* owes *tithe* where the land is cultivated with *tithe-water* ; *single tithe*, according to *Mohammed* ; and *double*, according to *Aboo Yoosaf* :—the reasons for this have been related before.

Cafe of a
Majoos.

RAIN-WATER, and the water of wells and fountains, and of lakes which are not under the particular authority of any individual, is what is termed *tithe-water* ; and the water of the artificial canals and aqueducts, constructed by the kings of *Ajim* (such as the river of *Yezdejird*,) is *tribute-water*.

Definition of
tithe water
and of *tribute-*
water.

* Meaning a worshipper of fire ;---a *Magus*, or *Majian*.

THE river of *Khârzim*, called the *Jyhoon* [Oxus] is *tithe*-water, according to *Mohammed*; and so likewise is the *Shyhoon*, and also the *Dijlet* [Tigris] and the *Firât* [Euphrates,] because those rivers are not under the authority of any person whatever, nor is any one entitled to an exclusive privilege with respect to them, wherefore they are the same as the open sea. *Aboo Yoosaf* considers the waters of all those rivers as *tribute*-water, because bridges of boats are occasionally thrown over them, which is an act of seizure, evincing that those who do so are the guardians of the stream; and hence the water of those rivers must necessarily be deemed *tribute*-water.

Impost upon
land the pro-
perty of *Tog-*
lib women or
infants.

THE lands of *infants* or *women* of the *Toglib* tribe are subject to the same laws as those of the *men* of that tribe: that is to say, upon their *tithe*-lands is imposed double *tithe*, and upon their *tribute*-lands single *tribute*; because peace was made with them on the terms of double contribution to purposes of charity, but not to the service of the state: moreover, the lands of *Mussulman* infants or women are subject to a single *tithe*, and therefore the same is to be levied twofold upon the lands of *Toglib* women and children.

UPON fountains of pitch or bitumen, or wells of sulphur, nothing is due where they are found in *tithe*-lands, because those productions do not come under the description of *growing out of the earth* [vegetables,] but are rather the same as the water of fountains, which spring out of its bosom, and are not subject to any impost. The proprietor of such places, however, is subject to *tribute* where they exist in *tribute*-lands; but this is to be understood only provided the contiguous soil be capable of cultivation, because the imposition of *tribute* depends upon the proprietor of the land being able to cultivate the same.

C H A P. VII.

Of the Disbursement of ZAKÂT, and of the Persons to whose Use it is to be applied.

THE objects of the disbursement of ZAKÂT are of eight different descriptions: FIRST, *Fakeers*;—SECONDLY, *Miskeens**;—THIRDLY, the collector of *Zakât*, (provided he be not a *Hashimee* †;)—FOURTHLY, *Mokâtibs*, (upon whom *Zakât* is bestowed, in order to enable them, by fulfilling their contract of *Kitâbat*, to procure their freedom;)—FIFTHLY, debtors not possessed of property amounting to a *Nisâb*;—SIXTHLY, *Fee Sabeel Oola*, [in the service of God ‡;]—SEVENTHLY, *Ibnus Sabeel*, or travellers;—and EIGHTHLY, *Mowlefut-al-kalloob*§. And those eight descriptions are the original objects of the expenditure of *Zakât*, being particularly specified as such in the KORAN; and there are, therefore, no other proper or legal objects of its application. With respect to the last, however, [*Mowlefut-al-kalloob*,] the law has ceased to operate, since the time of the prophet, because he used to bestow *Zakât* upon them as a bribe or gratuity to prevent them from molesting the *Mussulmans*, and also to secure their occasional assistance; but when God gave strength to the faith, and to its followers, and rendered the *Mussulmans* independant of such assistance, the occasion of bestowing this gratuity upon them no longer remained; and all the doctors unite in this opinion. By the term *Fakeers* is to be understood persons possessed of property,

Persons to whose use *Zakat* is to be applied.

Definition of the terms *Fakeer* and

* *Fakeer* and *Miskeen* both apply to persons in want; the distinction between these two terms is fully explained in the definition of them, a little lower down.

† A descendant from the tribe of the prophet.

‡ The meaning of this phrase is more particularly described in another part of this chapter.

§ The translator is not able to find any precise meaning for this term in the lexicons. By *Kullub* is understood an *Asil Arbee*, or original Arabian of the desert, and it is probable that some tribe of these is alluded to in this place.

the

Miskeen.

the whole of which, however, amounts to somewhat less than a *Nisâb*. By *Miskeens* is understood persons who have no property whatever. This comment upon the terms *Fakeer* and *Miskeen* is recorded from *Aboo Haneefa*. Some, however, hold the reverse description to be true.

Allowance to
the collector.

THE *Imâm* is to allow the officer employed in the collection of *Zakât* as much out of it as is in proportion to his labour: as much, therefore, is to be allowed as may suffice for himself and his assistants; and his allowance is *not* fixed to an *eighth*. *Shafeï* argues that *Zakât*, being appropriated to eight different objects, becomes thus divided into eight equal lots, of which one is the right of the collector, who is consequently entitled to an eighth of the whole. Our doctors argue that, as *Zakât* is paid to the collector, not as *alms*, but in the manner of a reward for service performed, it follows that the proportion paid him must be whatever may suffice for that purpose; and hence it is that the collector is entitled to pay himself out of the collections of *Zakât*, although he should be *rich* *.

Definition of
other terms.

By the phrase *Fee-ar-Rikâb*, mentioned in the KORAN, (where it treats of the objects of expenditure of *Zakât*,) is to be understood *Mokâtibs*: this definition is taken from *Seyid Ben Jeeroo*. And by the term *Gharumeen*, in the same passage, are meant *debtors*: *Shafeï* says that it means persons who have involved themselves in composing the differences of others. By the phrase *Fee Sabeel Oola*, in the same passage, is to be understood (according to *Aboo Yaosaf*) a person who, by poverty of estate, is incapacitated and cut off from taking a part in the wars of the faith; that is, in the *Jibâd Farz*. *Mohammed*, on the contrary, argues that the phrase here mentioned applies to a person who, by poverty, is incapacitated from performing pilgrimage:

* An *objection* and *reply* are here omitted, as they turn solely upon points of *verbal criticism*, and consequently do not admit of an intelligible translation.

the latter description, however, is necessarily implied and understood in the former; whence the phrase in question may be said to apply to both. It is to be observed that (according to our doctors) no portion of *Zakât* is to be paid to such warriors as are in a state of affluence, none being objects of its application but those who are poor.

By the term *Ibnus Sabeel* [travellers] is to be understood persons, in a strange place, having left their property at home, and who are consequently destitute of means of support.

THE seven descriptions of persons here specified are the proper objects of the application of *Zakât*; and a proprietor (who chooses to disburse his *Zakât* himself, and not to pay it to the collector) is at liberty either to distribute it, in equal shares, among *seven* persons of those different descriptions, or to pay the whole to *one* of them.—This is the opinion of our doctors.—*Shafëi* has said that a proprietor is not at liberty himself to disburse the *Zakât* upon his own property in any other way than bestowing a part upon three individuals of each several description. The arguments on both sides here turn on some peculiarities in the *Arabic* language. Our doctors take their opinion from *Amroo Bin Abbas*.

IT is not lawful to bestow *Zakât* upon a *Zimmee*, or infidel subject, because the prophet directed *Mâaz*, saying, “Take ZAKÂT from the “rich Mussulmans, and bestow it upon the poor Mussulmans.”—But although infidel subjects are not entitled to share in *Zakât*, yet other alms may be bestowed upon them in the manner of *Sadka*, or *alms-gift*.—*Shafëi* says that they are prohibited from partaking of these also, as well as of *Zakât*: but our doctors ground their opinion on this point upon a precept of the prophet, who has ordained that *alms* should be bestowed upon persons of every religion indiscriminately; and our doctors also alledge, that if it were not on account of the directions to

Zakat not to be bestowed upon *Zimmies*.

Mâaz

Máaz, before quoted, they should deem the bestowing of *Zakât* upon *Zimmees* to be legal.

Cases which
do not consti-
tute a pay-
ment of
Zakat.

IF a person employ the *Zakât* upon his property in the erection of a mosque, or the burial of the dead, yet his *Zakât* is not considered as being thereby discharged, because, in the payment of *Zakât*, it is established as a principle that it shall be made over to the person or persons entitled to it; and such delivery does not appear in this case.

IF *Zakât* be employed in discharging the debts of a defunct, this is not considered as a payment of *Zakât*, because delivery does not appear in this instance.

IF a person employ the *Zakât* upon his property in the purchase of a slave, for the purpose of granting him his freedom, this is not a discharge of *Zakât*. *Imâm Málik* maintains that this act amounts to a due discharge of *Zakât*; because he alledges that the phrase *Fear-Rikáb*, which occurs in the KORAN, applies to a slave thus bought and liberated: but our doctors argue that the emancipation of a slave amounts simply to a dereliction of property, and does not in any respect bear the construction of delivery or transfer of possession.

Persons who
are not the
proper objects
of its appli-
cation.

IT is not lawful to bestow any part of *Zakât* upon the rich, the prophet having declared that “*alms are not lawful to the wealthy.*”—*Shafëi* extends the use of *Zakât* to warriors, although they should be rich; but the precept here quoted is in proof against him.

IT is not lawful for an owner of property to pay the *Zakât* upon it to his father, grandfather, or great-grandfather; nor to his son, grandson, or great-grandson; because the use of property between him and those persons is *conjunct*,—that is to say, each of those relatives

latives is entitled to the use of the other's property; and hence transfer of property, in its full sense, does not exist in these cases.

It is not lawful for a proprietor to pay the *Zakât* upon his property to his *wife*, because the use of property is common between the husband and wife, according to general custom; nor is it lawful for a wife to pay the *Zakât* upon her property to her husband, (according to *Haneefa*,) for the same reason. The two disciples have said that it is lawful to give *Zakât* to the husband, because the wife of *Abd'-Oola-bin-Masood* asked the prophet, whether she should give *Sadka* to her husband?—to which he replied,—“*You have here two duties, one, that of SADKA, the other, that of RELATIONSHIP.*”—But to this our doctors reply, from *Haneefa*, that by the term *Sadka*, mentioned in this tradition, is to be understood the *Sadka Nisf*, or voluntary alms*.

It is not lawful for a proprietor to bestow the *Zakât* of his property upon his own *Mokâtib*, or *Am Walid*, or *Modabbir*, because in none of these cases is there a *transfer of property*, since that which falls to a *slave* becomes the property of his master;—and a master has, in like manner, a superior right in the property of his *Mokâtib*, whence the master's transfer of property to him cannot be established.

It is not lawful for a proprietor to bestow the *Zakât* of his property upon his slave, whom he may have partially emancipated, (according to *Haneefa*,) because such a slave is held by him to stand as a *Mokâtib*; but the two disciples maintain that the bestowing of *Zakât* upon such a slave is legal, because they hold this slave to be a debtor to his master†.

* In opposition to *Zakât*, which comes under the description of *Sadka Farz*, or obligatory alms; and consequently what is quoted above by the two disciples does not in any respect apply to the present case.

† That is for the remainder of his bondage. For a full explanation of this, see *Ittâk*.

It is not lawful to bestow *Zakât* upon the slave of a *rich* man, because, if it be made over to the *slave*, it becomes the property of his *master*, and the master being *rich*, the delivery of *Zakât* to him is illegal. And, in like manner, it is illegal to bestow *Zakât* upon the child of a rich person, being an infant, since the child is supposed to be rich in the property of the father: contrary to the case of the child of a rich person, being an adult, who is poor, he not being accounted rich in the property of his father, although his subsistence be a debt upon his parents: and also contrary to the case of the *wife* of a rich person, because she, if she be poor, is not accounted rich in the property of the husband, or in proportion to, or on account of, the subsistence she enjoys from him.

It is not lawful to bestow any part of *Zakât* upon persons of the tribe of *Hashim*; the prophet having said, “O, *descendants of Hashim!* “*of a truth God hath rendered unlawful to you the GHOOSÂLA* [water “dirtied by ablution] *of men, and also their CHIRK* [fifth,] *and in* “*lieu thereof he hath ordained to you a fifth of the fifth of all plunder:*” and by the term *Ghoosâla* is here to be understood the *Zakât* upon property, which is not lawful to *Hashimees*: contrary to *Sadka Nisf*: and by the term *Chirk* is to be understood the same. By the tribe of *Hashim* are here to be understood the families of *Alee*, and *Abbas*, and *Jafir*, and *Akleel*, and *Haris-Ibnal-Mootlib*; all these deriving their descent from *Hashim* the son of *Minâf*. But by the name *Hashim*, in the words of the prophet before quoted, is to be particularly understood *Hashim* the great-grandfather of the prophet, who also gives a name to a tribe *.—

Zakât is discharged by the erroneous

If a person were to bestow *Zakât* upon another, erroneously supposing him to be a proper object of its application, and should after-

* What follows of this passage relates merely to the *Arabian* tribes, and is therefore quite useless.

wards

wards discover him to be *rich*, or a *Hashimee*, or an *infidel*,—or, if he should give *Zakât* to a person in the *dark*, and afterwards discover that person to be his *father*, or his *son*,—in these cases *Zakât* is considered to be fully discharged, and no longer to remain due.—This is according to *Haneefa* and *Mohammed*.—*Abou Yoosaf* has said that, in the cases here recited, *Zakât* is still held to remain due, because it was in the power of that person to inquire into, and discover the particulars concerning him upon whom he bestowed *Zakât*, previous to making it over to him; and such being the case, where he is guilty of an evident neglect, his act is null, and consequently the *Zakât* is still a debt upon him; the same as where there are several vessels of water, some clean and others unclean,—or several garments, some pure and others defiled,—in which case, if a person, after due deliberation, select one of the pots of water, and perform his ablution with it, or put on one of the garments, and say his prayers, and he should afterwards appear to have committed an error, a repetition of the prayer or ablution is held to be incumbent upon him.—*Haneefa* and *Mohammed* support their opinion, in this case, upon a decision recorded of the prophet in a similar instance; and they moreover argue, that a knowledge of the situation and circumstances of men is only to be formed from conjecture, and cannot be easily obtained to a degree of decisive certainty, wherefore the matter is to be taken according to the donor's conception of it; the same as in a case of prayer, where if a man, intending to turn his face towards the *Kâba*, were to look in another direction, and pray, and his mistake afterwards appear, a repetition of the prayer is not incumbent upon him. It is recorded as an opinion of *Haneefa*, that *Zakât* is to be held discharged if thus bestowed, by mistake, upon a *rich* person, but not if bestowed upon a *Hashimee*, a *parent*, or a *child*; but the *Zâbir Rawâyet* accords with what was before advanced.—What is here mentioned proceeds upon a supposition that the *Zakât* has been bestowed after due deliberation, in consequence of the donor conceiving that the receiver is a proper object of its application: but if he should not have deliberated, or if,

application of
it to an im-
proper person,

after deliberation, a doubt still remain, the *Zakât* is not discharged, unless it afterwards appear that the receiver was a proper object of its application.

unless that person be the slave or *Mokâtib* of the donor.

If a person bestow *Zakât* upon another, and afterwards discover that this other is his own slave or *Mokâtib*, this is not held to be a discharge of his *Zakât*, because, in this case, there is no *transfer of property*, (according to what has been already remarked,) and the discharge of *Zakât* rests upon a *complete transfer* of it, as was formerly explained.

It is not thought proper to bestow *Zakât* upon a person possessed of a complete *Nisâb* in any property whatever, such an one being considered as coming under the description of *Ghannee* [rich,] because this is the law term for any one possessed of a *Nisâb*; but the condition on which any person is accounted a *Ghannee* is, that the *Nisâb* which constitutes his property be exclusive of all demands or incumbrances, (such as *debts*, and so forth;) and on this precise quantity of absolute property no *Zakât* is legally due from the proprietor, the *increase* thereof (understood in the lapse of *Hawlân-Hâwl*) being a condition of the obligation to *Zakât*.

Other persons upon whom *Zakât* may be lawfully bestowed.

It is lawful to bestow *Zakât* upon a person possessed of less than a *Nisâb*, although he be found in body and capable of labour, because such an one comes under the description of a *Fakeer*, who is one of the specified objects of its application, and also, because *actual necessity* in the situation or circumstances of the object is difficult to be ascertained, and therefore the rule is restricted to that description which affords *argument* of such necessity; and a deficiency in worldly property, to the amount of a *Nisâb*, affords such argument of necessity with respect to the proprietor.

If a person were to bestow to the amount of two hundred *Dirms*, or upwards,

upwards, of the *Zakât* of his property, upon one individual, such a procedure is abominable, but yet is legal.—*Ziffer* has said that this is illegal; because in the act of bestowing that quantity of *Zakât*, the person who receives it becomes a *Ghannee**, which would induce the idea of *Zakât* being bestowed upon a *Ghannee*; but to this our doctors reply, that the opulence of the person in question is an effect of the gift of *Zakât* to him, and therefore he does not come within the description of a *Ghannee* until *after* it has been bestowed;—yet, where discharge of *Zakât* tends to bring any one within the description of *Ghannee*, it is abominable, the same as prayer when performed near any filth.

ABOO HANEEFA has said, “*I regard it as most laudable to bestow, upon a FAKEER, ZAKÂT to such an amount as may preclude him from the necessity of begging for that day.*”

THE transfer of *Zakât* from one city to another is abominable, it being rather indispensable that the *Zakât* of every city be bestowed upon the claimants of that city; and also, because in this a regard is had to the rights of *Jowâr* [neighbourhood:]—and hence it is abominable in men to transfer the *Zakât* upon their property from their own city to another, except either for the use of their relations, or for the purpose of assisting those who may be in greater necessity than the inhabitants of their own city; because in the one case exists the peculiar duty of consanguinity, and in the other the application of relief where it is most required.—But although the transfer of *Zakât* from one city to another, excepting for the purposes here mentioned, be accounted abominable, yet it amounts to a valid discharge of *Zakât*, because the term *Fakeer*, mentioned in the sacred writings as one of the proper objects of the application of *Zakât*, is not *local*, but *general*.

Zakât of one city not transferable to another except in certain cases.

* Literally, a *rich* person, in opposition to *Fakeer*, a *poor* person.

C H A P. VIII.

Of SADKA-FITTIR.

Definition of
the term.

By *Sadka-fittir* is understood the alms bestowed upon the poor on the *Yd-al Fittir*, or festival of breaking Lent.

Obligation of
Sadka fittir.

SADKA-FITTIR is incumbent upon all free *Mussulmans* possessed of property to the amount of a *Nisâb* clear of incumbrance. The obligation to *Sadka-fittir* is founded on a precept of the prophet, who, in a discourse upon the festival of breaking Lent, said, “*Let every person, whether INFANT or ADULT, bestow [upon the poor] half a SÂA of wheat, or one SÂA of millet or of barley.*” This saying is recorded by *Salba-Adwee*, but being of the class of *Hidees Abâd**, it establishes only a *moral* but not a *religious* obligation.

Conditions of
the obliga-
tion.

FREEDOM is made a condition, in order that the assignment [of the *Sadka*] may be complete: and *Islam*, or profession of the faith, is also made a condition, in order that this donation may bear the construction of an oblation and act of piety, of which infidels are held incapable: and the possession of a *Nisâb* is also made a condition, the prophet having declared, “*Alms are not expected to be bestowed but from the ability of the RICH.*” *Shafëi* has said that the *Sadka-fittir* is incumbent upon every person who possesses property to the amount or value of one day’s subsistence for himself and family; but the above precept of the prophet is in proof against him.—It is to be observed that *wealth* is determined at the rate of a *Nisâb*, because that is the standard by which the law measures it; but this, with the reserve of its being exclusive of all incumbrances, as whatever may be so occu-

* *The singular traditions*;—that is, those which are not included among the *approved* traditions, and therefore are not supposed to be possessed of the same authority.

pied is accounted non-existent; but *increase* in it is not a condition.— There are three things connected with the possession of a *Nisâb*, such as is here described; FIRST, prohibition against the acceptance of alms; SECONDLY, obligation to perform sacrifice; and THIRDLY, obligation to bestow *Sadka-fittir*.

THE *Sadka-fittir* is incumbent upon every individual respectively, *Ebn Amir* having recorded that the prophet has constituted *Sadka-fittir* an absolute injunction [*Farz*] upon all mankind, and both sexes, indiscriminately.

Persons upon whom, or in whose behalf, it is incumbent.

It is incumbent upon a man to discharge the *Sadka-fittir* in behalf of his children, being infants, because he is their guardian, and their provision is a debt upon him; wherefore the accomplishment of their duties of *Sadka* must also rest upon him, this being considered as a part of their provision. And, in the same manner, a man must discharge the *Sadka-fittir* in behalf of his male and female slaves, he being their guardian, and their subsistence depending upon him. What is here advanced proceeds entirely upon a supposition that the slaves are not held by the proprietor merely in the way of traffick; and also that his children are not possessed of any independent property; for, if the children be possessed of property, their *Sadka-fittir* is to be discharged out of that, according to the two *Sheicks*. *Mohammed* contradicts their opinion in this instance. The argument of the two *Sheicks* is that the lawgiver has considered *Sadka-fittir* the same as *Niska**, and therefore it is to be held as such.

THE *Sadka-fittir* is not incumbent upon a man in behalf of his wife, because his power of guardianship and provision, with respect to her, is incomplete, since a husband is not guardian over his wife any farther than respects the rights of marriage, nor does the provision for her rest upon him any further than with respect to *food, clothing, and*

Persons upon whom, or in whose behalf, it is not incumbent.

* The subsistence due to a wife, parent, child, and other relations.

lodging,

lodging, which are termed *Rawâtib* [necessaries,] any thing beyond which he is not accountable for.—And, in the same manner, it is not incumbent upon a man to disburse the *Sadka-fittir* for his children, being adults, although these form a part of his family, because he is not invested with any authority of guardianship over them.—But yet if a man were to disburse the *Sadka-fittir* on behalf of his wife or adult children, without their desire, it is lawful, on a principle of benevolence, their consent being by custom understood.

It is not incumbent upon men to pay the *Sadka-fittir* for their *Mokâtibs*; neither is it incumbent on a *Mokâtib* to pay it on his own account, such an one coming under the description of a *Fakeer*.

Exception.

It is incumbent on men to pay *Sadka-fittir* on behalf of their *Modabbirs* and *Am-Walids*, as being invested with complete authority over them.

Not incumbent on behalf of slaves kept as articles of traffick.

It is not incumbent upon men to pay *Sadka-fittir* on behalf of their male and female slaves designed for sale as merchandize. *Shafëi* alledges that the *Sadka-fittir* is obligatory upon such slaves, and that the proprietor is to pay it for them; and that the *Zakât* upon them is due from the proprietor. In short, *Shafëi* holds that *Sadka-fittir* is due from the slave, and *Zakât* from their proprietor, on two distinct and separate accounts; and consequently, that this does not induce the idea of a repetition of *Sadka* upon one and the same property: but with our doctors the obligation to *Sadka-fittir*, on behalf of slaves, is held to rest upon their owner, the same as *Zakât*; and consequently, if the payment of the former were incumbent, it would admit the idea of two *Sadkas* upon one property within the year, which is illegal.

Nor on behalf of a partnership slave.

No *Sadka-fittir* is incumbent upon any of the proprietors on account of a partnership slave, because none of them, individually, is invested

invested with complete authority over him, nor obliged to furnish his entire provision. And, in the same manner, no *Sadka-fittir* is incumbent upon any of the proprietors, on account of two or more partnership slaves, according to *Haneefa*.—The two disciples have said that, in this case, *Sadka-fittir* is incumbent upon the proprietors; but in such a degree only, with respect to their shares, as may amount to a complete slave or slaves, and not to any fractional part or portion of them: for instance, if there were five slaves held in partnership by two men, each partner would have to pay *Sadka-fittir* for *two* slaves, and not for *two and a half*.—Some, however, have said that the two disciples agree with *Haneefa* in their doctrine upon this point, because the share of each partner, individually, cannot be collected into any particular slave or slaves, until a partition take place of the partnership stock, and consequently none of them appertains to either partner in particular.

It is incumbent upon *Mussulmans* to pay the *Sadka-fittir* for their infidel slaves, on the authority of the tradition of *Salba-Adwee*, already quoted, because there the term *slaves* is used *generally*, and is not restrictively applied to *Mussulman* slaves: moreover, in the traditions of *Abbâs*, it appears that the prophet said “*Render SADKA-FITTIR on behalf of every freeman, and also of every slave, be that slave a CHRISTIAN, a JEW, or a PAGAN:*” and further, it is incumbent, because the occasion of the obligation is here established, and the proprietor [of the slave] is capable of taking upon him the responsibility for such obligation. *Shafëi* maintains that, in this instance, no *Sadka-fittir* is due, because the obligation to *Sadka-fittir* rests upon a slave himself, and not upon his owner; and the former (in the case here supposed) is incapable of such obligation, as being an infidel.

Incumbent
on behalf of
infidel slaves:

If the slave be a *Mussulman*, and his master an *infidel*, in this case no *Sadka-fittir* whatever is due for such slave, according to all the doctors; according to our doctors, evidently, because they hold the

but not on
behalf of a
slave the pro-
perty of an
infidel.

obligation of *Sadka-fittir*, with respect to the slave, to rest upon the master, and here the master is an *infidel*; and, according to *Shafëi*, because he holds the obligation to rest upon the slave himself, to be discharged by his master; and the master, in the present case, is incapable of discharging it, as being an *infidel*.

Cafe of a
slave sold with
a reserve of
option.

If a slave be sold with a reserve of option to one of the parties, the seller or the purchaser, determinable on the ensuing festival of *Fittir*, in this case the *Sadka-fittir*, on behalf of that slave, is incumbent upon the party to whom he may ultimately belong.—*Ziffer* alledges that the discharge of the *Sadka-fittir* rests with the party in whose behalf reserve of option was made a condition, because the authority over that slave is in fact vested in him. *Shafëi* maintains that it rests with him who has possession in the interim, whom he holds to be the purchaser, on this ground, that the furnishing *Sadka-fittir* is one of the rules of *possession*, the same as furnishing *subsistence*.—Our doctors argue that the possession of the slave, in the present case, is a matter which remains in suspense, since, if he to whom the option was reserved chuse to dissolve the sale, the property in the slave reverts to the seller; but, on the other hand, if he confirm the sale, and render it valid, the slave becomes the property of the purchaser from the period of the original engagement; and the possession thus remaining in suspense, that which depends upon such possession must remain suspended also: contrary to the case of *Nifka*, which is requisite from day to day, to supply the wants of nature, and is consequently incapable of such suspension. And if this slave be an article of traffick, the same difference of opinion holds with respect to the *Zakât* upon him.

SECTION.

Of the Measure of SADKA-FITTIR, and of the Time of its Obligation and its Discharge.

THE measure of a *Sadka-fittir* in wheat, or flour, or bran, or in dried fruits, is an half *Sâa*; and in dates or barley it is one *Sâa*. The two disciples say that dried fruits are the same as barley in this respect; and there is also one tradition of the opinion of *Haneefa* to the same effect.—The former is the doctrine recorded in the *Jama Sagbeer*. *Shafeï* says that the measure of a *Sadka fittir*, in all the articles here specified, is one *Sâa*; because *Aboo Seyid Kadooree* remarks that this was the customary *Sadka-fittir* in all articles in the time of the prophet.—Our doctors support what was before advanced on the authority of the tradition of *Salba Adwee*, already repeatedly quoted; and the doctrine of the whole of the companions, (such as the *Kbolfâ Rashidine** and others,) is consonant to that of our doctors: the tradition, also, of *Aboo Seyid*, cited by *Shafeï*, implies no more than that, in the time of the prophet, people were accustomed to give something over what was obligatory.—The two disciples alledge (in support of their opinion, *that dried fruits are the same as barley*) that *Khurma* [dried dates] is one species of dried fruits; and they being considered the same as barley, it follows that all dried fruits, as being of one general description, should be subject to the same rule. The argument of *Haneefa* is, that dried fruits and barley are of a correspondent nature, because as the poor eat the flour of wheat with its bran, so do they dried fruit with its core or stone: contrary to *dates*, which are the same as barley, in as much as the stones of the one and the bran of the other are thrown away.—Barley meal is the same as barley; but it is best that, in discharging the *Sadka-fittir* in the flour or bran of either barley or wheat, attention be paid to the *value*; that is to say, if, for instance, the value of half a *Sâa* of flour be equal to that of the

Proportion of
Sadka-fittir,
and the ar-
ticles in
which it may
be discharged.

* The immediate successors of the prophet.

same quantity of wheat, it will suffice to give half a *Sâa* of flour, but otherwise not; and the same with respect to barley-meal.—This is not noticed in the *ŷama Sagbeer*, because the value of the meal or flour does not commonly fall short of that of the grain, but rather generally exceeds it.

IN discharging the *Sadka-fittir* with *bread* regard is to be had to the *value* only; this is approved doctrine.

THE half *Sâa* now mentioned is to be ascertained by *weight*, according to *Haneefa*; but the two disciples hold that it is to be ascertained by *measure*.

IN discharging the *Sadka-fittir*, flour is preferable to wheat, and money is preferable to flour, according to what is recorded from *Aboo Yoosaf*; because money satisfies the wants most amply, and flour most readily: contrary to wheat, which, after it is bestowed, requires to be made flour before it is fit for use.—It is recorded, as an opinion of *Aboo Bîkr Ayâmush*, that wheat is preferable either to flour or money, because this is universally admitted to be a proper article in which to discharge the *Sadka-fittir*, whereas concerning money and flour there are various opinions.

THE *Sâa*, according to *Aboo Haneefa* and *Mohammed*, consists of eight *Ratls** of the *Ratls* of *Irâk*.—*Aboo Yoosaf* has said that it is only five *Ratls* and one third; and this is also the doctrine of *Shafëi*; the prophet having said “*Our SÂA is smaller than that of others.*”—The argument of the *Tirrafine*†, in this case, is, that it is recorded by the prophet, that he performed the *Woozo* by the *Mid*, (which is two *Ratls*,) and the *Ghozl* by the *Sâa*, (which is eight *Ratls*;) and the *Sâa* of *Omar* was the same: moreover, this *Sâa* is small compared with that of *Hashimee*, which was the *Sâa* in common use,

* A *Ratl* is about fourteen ounces.

† Literally, *the two extremes*, as being the *oldest* and *youngest* of the three orthodox doctors; namely, *Haneefa* and *Mohammed*.

wherefore it is lawful to regard that mentioned in the tradition above quoted as the standard in *Sadka-fittir*.

THE obligation to the performance of *Sadka-fittir* commences with the dawn of the morning of the festival of *Fittir*; that is to say, the arrival of that specified period is a condition of its obligation. *Shafëi* alledges that the obligation commences with the sunset of the last day of *Ramzân*:—and the result of this difference of opinion is, that if (for instance) an *infidel* were to be converted, and to become a *Mussulman*,—or, if a child were to be born,—on the eve of the festival of *Fittir*, the *Sadka-fittir* would be due on account of the convert or the child, according to our doctors; but, according to *Shafëi*, it would not be due: and, on the other hand, if a man's child, or male or female slave, were to die on the last night of *Ramzân*, *Sadka-fittir* is incumbent upon him on their account, according to *Shafëi*; but it would not be so, according to our doctors.—The argument of *Shafëi*, in this case, is that the *Sadka-fittir* is essentially connected with, and bears relation to *Fittir*, [the act of breaking of fast,] as the connection of the terms evinces; and the sunset of the last day of *Ramzân* is the time of *Fittir*, because the fast may be then broken.—To this our doctors reply, by admitting that the *Sadka-fittir* is certainly connected with the act of *Fittir*, but the *Fittir* has reference to the *day*, and not to the *night*, whence it is that this period is expressed by the words *Yawm-al-fittir* [day of breaking fast,] and not by the words *Lail-al-fittir* [night of breaking fast;] and hence it follows that the obligation to the performance of *Sadka-fittir* is connected with the *morning* of the festival of *Fittir*, and not with the *eve* thereof.

Time of the
commence-
ment of the
obligation.

It is most laudable that men discharge their *Sadka-fittir* on the day of the festival of *Fittir*, before they proceed to the mosque to perform the prayers of that festival, because the prophet did thus; and also, because the precept regarding *Sadka-fittir* was issued with a view that this donation might relieve the wants of the poor, and thereby enable them

them to enjoy the festival, and to unite in the duties of it with a cheerful mind; and the design is best answered by the donation being made before prayer.

If the *Sadka-fittir* be discharged previous to the day of the festival of *Fittir*, it is lawful; because the discharge of an obligation, at any time after the establishment of the *cause* of the obligation, is legal, in the same manner as that of *Zakât* previous to the lapse of *Hawlân-Hâwl*.

If a person were not to discharge the *Sadka-fittir* within the day of the festival of *Fittir*, yet the obligation still continues, and it is proper that it be made good afterwards, because the obligation of it is imposed with a view to the relief of the poor, which object still remains: contrary to *sacrifice*, the obligation to which, if it be neglected on the *Yawn-al Nibr*, [the *day of sacrifice*, being the tenth of the month *Zee-al Hidjee*,] drops altogether;—this being merely an act of piety, in which the wants or rights of others are no way concerned.

H E D A R A.

B O O K II.

Of NIKKAH, or MARRIAGE.

NIKKAH, in its primitive sense, means *carnal conjunction*. Definition of the term.
 Some have said that it signifies *conjunction* generally. In the language of the law it implies a particular contract used for the purpose of legalizing generation.

- Chap. I. Introductory.
- Chap. II. Of *Guardianship* and *Equality*.
- Chap. III. Of the *Mahr*, or *Dower*.
- Chap. IV. Of the Marriage of *Slaves*.
- Chap. V. Of the Marriage of *Infidels*.
- Chap. VI. Of *Kissm*, or *Partition*.

CHAP.

CHAP. I.

Forms under
which mar-
riage may be
contracted.

MARRIAGE is contracted,—that is to say, is effected and legally confirmed,—by means of *declaration* and *consent*, both expressed in the preterite, because although the use of the preterite be to relate *that which is past*, yet it has been adopted, in the law, in a *creative* sense, to answer the necessity of the case *.—*Declaration*, in the law, signifies the speech which first proceeds from one of two contracting parties, and *consent* the speech which proceeds from the other in reply to the declaration.

MARRIAGE may also be contracted by the parties expressing themselves, one in the *imperative*, and the other in the *preterite*; as if a man were to say to another “Contract your daughter in marriage to me,”—and he were to reply “I have contracted” [*my daughter to you*,]—because his words “Contract your daughter to me” are expressive of a commission of agency, empowering to contract in marriage; and one person may be authorized to act on both sides in marriage, (as shall be hereafter explained;) wherefore the reply of the father, “I have contracted,” stands in the place both of *declaration* and *consent*,—as if he had said “I have contracted, and I have consented.”

MARRIAGE may also be contracted by the use of the word NIK-KAH, or *marriage*,—as if a woman were to say to a man “I have married myself to you for such a sum of money †,” and the man were to reply “I have consented:” and, in like manner, by the word *Tazweej*, or *contracting in marriage*, as if a woman were to say to a man “I have contracted myself in marriage unto you,” and so

* Because the *present* and *future* being expressed, in the *Arabic* language, under *one* form, a contract expressed in the *present* would be *equivocal*.

† Meaning her *dower*.

forth :

forth:—and so also, by the word *Hibba*, or gift *, as if she were to say “ I have bestowed myself upon you:” and likewise, by the word *Tamleek*, or consignment,—as if she were to say “ I have consigned myself over to you:” and so also, by the word *Sadka*, or alms-gift, as if she were to say “ I have given myself as an alms unto you.”—*Shaffëi* is of opinion that marriage cannot be contracted except by the words *Nikkah* and *Tazweej*, because the term *Tamleek* (for instance) does not bear the construction of *matrimony* either in a literal or metaphorical sense;—evidently not in a *literal* sense, this term never being used to express marriage; nor in a *metaphorical* sense, because a metaphor is to be understood in a particular sense only from the propriety of its application, which is not the case here, the terms *Nikkah* or *Tazweej* implying *conjunction*, (as was before observed,) and between the possessor and the possession no conjunction whatever exists. The argument of our doctors, in this case, is that consignment operates as the principle of a right to a carnal conjunction in the subject of it, in virtue of a right in the person, (as in the case of *female slaves*;) and the right to carnal conjunction is also established by matrimony; wherefore, as marriage and consignment thus appear to be both principles operating to the same end, the latter may be metaphorically taken for the former.

MARRIAGE may be contracted by the use of the term *Beeya*, or *sale*; as if a woman were to say to a man “ I have sold myself into your hands,” and this is approved, because sale operates as the principle of a right in the person, and a right in the person is the principle of a right to carnal conjunction, whence the propriety of the metaphorical application of sale to matrimony.

ACCORDING to the *Rawâyet Saheeh*, marriage cannot be contracted by the use of the term *Ishârit*, or *hire*,—(as if a woman were to say

* This, and the two following terms, are such as are used where the woman does not stipulate any *dower*.

“I have hired myself to you for so much;”)—nor by *Ibâhit*, or permission; nor by *Ihlâl*, or rendering lawful; nor by *Areet*, or loan; none of these operating as the principle of a right to carnal conjunction.—Neither can marriage be contracted by the use of the term *Waseeyat*, or bequest; because bequest does not convey any right of possession until after the testator's death;—and as a contract of marriage in *express* terms, referring the execution of it to a period subsequent to the decease of either of the parties, would be null, so also, in the present case, *a fortiori*.

Must be contracted in the presence of witnesses.

Qualification of a witness.

Persons may witness a marriage, whose testimony would not be received in other cases.

MARRIAGE, where both the parties are *Mussulmans*, cannot be contracted but in the presence of two male witnesses, or of one man and two women, who are sane, adult, and *Mussulmans*, whether they be of established integrity of character or otherwise, or may ever have suffered punishment as slanderers.—The compiler of this work observes that evidence is an essential condition of marriage, the prophet having declared “*no marriage is good without evidence*;” and this precept is a proof against *Mâlik*, who maintains that in marriage *notoriety* only is a condition, and not *positive evidence*.—It is necessary that the witnesses be *free*, the evidence of *slaves* being in no case valid, because such are not competent to act in any respect *sui juris*: and it is also requisite that they be of sound mind and mature age, because minors or idiots are incapable of acting for themselves; and it is likewise necessary that they be *Mussulmans*; the evidence of *infidels* not being legal with respect to *Mussulmans*.

The *sex* of the witnesses is not an essential condition of their competency, inasmuch that marriage may be lawfully contracted in the presence of one man and two women:—neither is the *integrity* of the witnesses an essential condition, inasmuch that (according to our doctors) a marriage is valid if contracted in the presence of two *Fasiks*, or unjust persons*.—*Shafei* maintains that the integrity of the witnesses

* The word *Fasik*, which throughout this work is used in contradistinction to *Adil*, has therefore been rendered, in the translation, *unjust*, which is indeed the most common acceptance

nesses is an essential condition, because evidence is entitled to reverence and respect, the prophet having said “pay reverence to witnesses;” and *Fasiks* are not proper objects of such reverence, but rather the reverse.—To this our doctors reply that *Fasiks* are competent to act for themselves, and of course competency in evidence must also appertain to them, since they are not incapacitated from acting with respect to others; a *Fasik*, moreover, is capable of holding the office of a *Sultan* or an *Imâm*, whence it follows that he is also capable of becoming a *Kâzee*, or a witness.—A person who has suffered punishment for slander, as being still possessed of general competency, is also capable of bearing witness, so far as merely respects declaration and consent in matrimony, but no farther, there being a positive prohibition to the reception of such a person’s evidence, which, however, admits of exception in the present case, like that of blind persons, or of the children of the parties, whose evidence, although not admissible in any other case, is yet allowed in marriage.

IF a *Mussulman* marry a female *infidel* subject in the presence of two male *infidel* subjects it is lawful, according to *Aboo Yoosaf* and *Haneefa*. *Mohammed* and *Ziffer* maintain that it is not lawful, because their testimony, with respect to declaration and consent in marriage, amounts to *evidence*, and the evidence of *infidels* regarding *Mussulmans* is illegal; whence it is the same in fact as if they had not heard the declaration and consent of the parties. The argument of the two elders, in reply to this objection, is, that evidence is required in matrimony, not with any view to the ascertainment of a point of property, (such as *dower*,) but merely in order to establish the husband’s right of cohabitation, which is in this case the object.

Infidels may witness the marriage of an infidel woman :

IF a man desire another to contract his daughter (being an infant)

the negotiator of the con-

acceptation of the word; it must, however, be understood to relate to a person who neglects decorum in his behaviour and dress, and such other inferior points, rather than to one who is actually known to be *dishonest*.

tract may
also, in cer-
tain cases, be
a witness to
it.

in marriage to a third person, and the other should accordingly contract his daughter, upon the spot, to the third person, in the presence of the person so desiring, and the act be witnessed by only *one* person besides these two, the marriage is lawful; because, in this case, the father, as being upon the spot, is considered as the actual contractor of the marriage [on behalf of his daughter;] wherefore the second person stands merely as the *negotiator* of the contract, and of course, not appearing as a *party* in it, is a competent witness with the other. But, if the father of the infant aforesaid should go away, and be not actually present at the execution of the contract, the marriage would be null; because the father, as not being present, cannot be considered as the contractor, that appellation properly applying to the other—who appears to act, in his absence, as his matrimonial agent on his daughter's behalf; consequently here would be only *one* competent witness present; and one evidence is not sufficient; whence the marriage would be illegal.—And the rule is the same where a father matches his daughter, (being an adult,) at her desire, in the presence of one other witness; that is to say, if the daughter be herself present at the execution of the contract it is legal, otherwise not.

SECTION.

Of the PROHIBITED DEGREES; that is to say, of Women whom it is lawful to marry, and of those with whom Marriage is unlawful.

It is unlawful
to marry a
mother, or a
grandmother,

A MAN may not marry his mother, nor his paternal or maternal grandmother; because the word of GOD in the KORAN says “YOUR AMs (that is, *your mothers*) AND YOUR DAUGHTERS ARE FORBIDDEN “TO YOU;” and the primitive sense of the term AM [*mother*] being *origin* or *root*, the grandmothers are comprehended in this prohibition. The illegality of such a connexion is, moreover, supported upon the united opinion of all our doctors.

A man

A man may not marry his daughter, on the authority of the text above quoted, nor his grand-daughter, nor any of his direct descendants. a daughter or a grand-daughter,

NEITHER may a man marry his sister, nor his sister's daughter, nor his brother's daughter, nor his paternal aunt, nor his maternal aunt; the prohibition of such in marriage being included in the text already quoted. a sister, a niece, or an aunt,

ALL the degrees of aunts are also included in this prohibition; to wit, maternal and paternal aunts, as well as the aunts of the father, and the aunts of the mother, both paternal and maternal:—so also the daughters of all the brothers; that is to say, of the full brother, and of the paternal* brother, and of the maternal brother; and, in like manner, the daughters of all sisters, to wit, of the full sisters, and of the paternal sisters, and of the maternal sisters; because the terms *Amma*, *Khala*, *Okh*, and *Okht*, which occur in the passage of the KORAN already cited, apply to all those degrees of kindred.

It is not lawful for a man to marry his wife's mother, whether he may have consummated his marriage with her daughter or not, the Almighty having prohibited such a connexion in general terms, without any regard to that circumstance: neither is it lawful for a man to marry the daughter of his wife; but this only, provided he have already consummated his marriage with the latter, because the sacred text restricts the illegality of this union to that circumstance, wherefore marriage with the daughter of the wife is illegal, where carnal connexion has taken place with the latter, whether the daughter be an inmate of the husband's *Haram* or not. It is here to be observed, that the text in the sacred writings which says "YOUR or a mother-in-law,
or a step-daughter.

* By the terms *maternal* or *paternal*, applied to brothers and sisters, is to be understood *half* brothers or *half* sisters, by the father's or mother's side.

“ WOMEN WHO RESIDE IN YOUR *Harams*, BEING THE DAUGHTERS
 “ OF YOUR WIVES WITH WHOM YOU HAVE HELD COHABITATION,
 “ ARE UNLAWFUL TO YOU,” has merely reference to custom, and
 does not imply that the residence of the daughter in the man’s *Haram*
 along with her mother is unlawful; for it is usual, when a man marries
 a woman who has a daughter by a former husband, that the latter ac-
 companies her mother to his house, and is thence considered as one of
 his *Haram* *.

or a step-mo-
 ther, or step-
 grandmo-
 ther,

It is unlawful for a man to marry the wife of his father, or of his
 grandfather, God having so commanded, saying “ MARRY NOT
 “ THE WIVES OF YOUR PROGENITORS.”

or a daugh-
 ter-in-law, or
 grand daugh-
 ter-in-law,

NEITHER is it lawful for a man to marry the wife of his son, or
 of his grandson, the Almighty having said “ WED NOT THE WIVES
 “ OF YOUR SONS, OR YOUR DAUGHTERS WHO PROCEED FROM YOUR
 “ LOINS.”

or a nurse,
 or a foster-
 sister,

It is not lawful for a man to marry his foster-mother, or his
 foster-sister, the Almighty having commanded, saying “ MARRY
 “ NOT YOUR MOTHERS WHO HAVE SUCKLED YOU, OR YOUR
 “ SISTERS BY FOSTERAGE;” and the prophet has also declared,
 “ *Every thing is prohibited by reason of fosterage which is so by reason*
 “ *of kindred.*”

or two sisters.

It is not lawful to marry and cohabit with two women being
 sisters, neither is it lawful for a man to cohabit with two sisters in
 virtue of a right of possession, [as being his *slaves*,] because the
 Almighty has declared that such cohabitation with sisters is un-
 lawful.

* This observation is introduced merely with a view to explain an ambiguity in the
 text referred to.

IF a man marry the sister of his female slave with whom he has not cohabited, such marriage is approved, the contract being, in this case, entered into by parties competent in every respect.—And this marriage being legal and valid, the man must not afterwards hold any carnal connexion with his female slave, even though he should never consummate his marriage carnally with her sister, because a wife stands, in the law, as a *Fœmina Fututa*:—neither should the husband indulge in the connubial enjoyment with this wife until he shall previously have rendered her sister [the slave] unlawful to him, and relinquished his right of cohabitation with her, by some means or other, such as emancipating her, or marrying her to another man, in order to avoid the construction of cohabitation with sisters; but having so done, he may afterwards cohabit with his wife; because then no breach of the law would ensue, since a female slave is not held in the law, merely as such, to be a *Fœmina Fututa*.

Case of two
sisters.

IF a man should happen to marry two sisters by two contracts *, and it be not known with respect to which marriage first took place, a separation from both the sisters must ensue; because it is evident that his marriage with *one* of the *two* is illegal, but it is impossible to ascertain with which, by reason of ignorance of priority; nor is it conceivable that a judgment should be pronounced legalizing the marriage of either, unspecified, since the marriage of both remaining unascertained, a rule to make the same valid would be illegal, as not leading to any good or advantage; for the advantage proposed in matrimony is *procreation*, which is unattainable without carnal connexion of the parties; and this connexion with a woman unspecified is inadmissible: moreover, allowing the marriage to be valid, it would be injurious to both, as laying them under the matrimonial restraints

Another case
of two sisters.

* This doubtless supposes a case where a man is contracted in marriage through the agency of others empowered by him for that purpose, (as shall be shewn in an ensuing chapter) and who may engage in the contract without his immediate knowledge.

without

without the advantage of the connubial enjoyment, which neither could legally possess; for all which reasons their separation is indispensable. And in this case each sister is entitled to receive an half dower, because, if either could have been proved to be first married, she would have had a claim to her *full* dower, but the priority of marriage of either remaining unascertained, the dower is thus divided between them.—Some have said that this is only where each of the sisters respectively maintains the priority of her marriage without either being able to adduce any proofs; but that where they both declare their ignorance of such priority, nothing whatever is to be paid to either, until such time as both agree to receive an half dower, as above, because that is due to them in virtue of a priority unascertained, wherefore it is necessary either that each should respectively maintain her priority, or that both should agree, as above, before any decree for payment of an half dower to each could be passed.—But if each sister maintain her priority, and both produce equal evidence in support of it, an half dower is the right of each, according to all the doctors.

A man may
not marry an
aunt and niece:

It is unlawful for a man to marry two women, of whom one is the *aunt* or *niece* of the other, the prophet having declared a precept, as recorded in the *Zâbir-Rawâyet*, to this effect.

or two women
related within
the prohibited
degrees.

It is not lawful for a man to marry two women within such degree of affinity as would render a marriage between them illegal, if one of them were a *man*,—and for the same reason, because this would occasion a confusion of kindred.

A man may
marry a wo-
man and her
stepdaughter.

BUT a man may marry two women, one of them being a widow, and the other the daughter of that widow's former husband by another wife, because here exists no affinity, either by blood or fosterage.—*Ziffer* objects to this, and maintains that the marriage would be illegal; because, if the daughter were supposed a *man*, a marriage between
her

her and the widow would be illegal, and these two consequently stand in the same predicament, with respect to each other, as those in the preceding case.—To this our doctors reply that the illegality there stated is supposed to exist only in cases where this supposition, if applied to either of the women, would render their marriage illegal; but that does not hold in the present instance, for if the widow were supposed to be a man, she could lawfully marry the daughter.—And it is moreover related, in the *Nakl Saheeb*, that *Abdoola* the son of *Jafir* married a wife and a daughter of *Alee*.

IF a man commit whoredom* with a woman, her mother and daughter are prohibited to him.—*Shafei* maintains that they are not prohibited, because whoredom does not induce *Hoormat-Moosâbirat*, or *prohibition from affinity*, as this law of *prohibition* is a peculiar distinction bestowed upon the servants of God through the divine favour, and whoredom, being a crime, cannot possibly induce that which is a favour of God.—To this our doctors reply, that the carnal act operates as a principle or cause of a mutual participation of blood between the parties concerned in it, in virtue of the child which is, or may be, the fruit thereof, that partaking of the father and the mother respectively, *in toto*, for it is usually said “This child is the “offspring of such a *man* and of such a *woman* ;” and this participation being thus established between the child and each of the parents respectively, it is virtually so between the parents themselves, because although a portion of the child be a part of the mother, yet it is attributed, *in toto*, to the father, whence a part of the mother is attributed to him; and *vice versa*; and a mutual participation of blood being thus established between the man and the woman, it follows that the mother or the daughter of the latter stands as the actual mother or daughter of the man, because the former would be the *grandmother* of the child produced by such act of whoredom; she is therefore the root of the root of such offspring, and the offspring is the

Cases which induce illegality.

* Arab. *Zinna*, meaning either *fornication* or *adultery*.—(Vide Sales's *Koran*.)

branch of a branch from her; and it is inconceivable that the child should be a branch of a branch from her, unless the fornicator were considered as a branch from her, and the grandmother the root of the fornicator: and the same reasoning applies with respect to the daughter.

If a woman touch a man in lust [i. e. *manu penem fricans, stuprum excitat,*] the mother and daughter of that woman are thereby prohibited to him.—*Shafëi* says that they are not prohibited. And the same difference of opinion obtains in cases where a man touches a woman in lust, or sees the pudendum of a woman; or where a woman sees the yard of a man in lust; in all which instances our doctors hold that the mother or daughter of such woman are rendered unlawful to the man: but *Shafëi* maintains a contrary sentiment, arguing that seeing or touching do not amount to the *absolute act*, inasmuch that the usual ceremonies required by the law, after the carnal act *, are not here necessary.—To this our doctors reply, that such acts as those, being a cause of copulation, stand as that constructively.—It is to be observed, that by *touching in lust*, with respect to a man, is meant producing a priapism with the hand, or increasing the turgidity of the virile member, by the same means, where the priapism already exists.—This is an approved definition of that phrase, as to the term *lust*, with respect to young men in full vigour and equal to the performance of coition; but with respect to old men, and *Inneens* (or persons naturally impotent,) the exciting of lust amounts only to causing the heart to beat more quickly than usual, or increasing that palpitation where it already exists.—By the exciting of lust in women or eunuchs is understood simply causing a desire of coition, or increasing that desire where it already exists.—These definitions are recited at large in the *Fatâvee Alumgueeree*. By seeing the pudendum of a woman is understood, seeing the entrance of the vagina,

* Such as *ablution*, and so forth.

which

which is not supposed practicable unless she be in a reclining posture.

IF a man indulge in lewdness with a woman until he produce an emission, some have said that this occasions *Hoormat-Moosâbirat*, or prohibition from affinity, [with respect to the kindred of that woman;] but it is certain that this does not occasion prohibition, because the man, by producing an ex-vulval emission, manifests that coition was not his intention; wherefore it does not stand as such. And, in like manner, if a man enter a woman *in ano*, some have said that this occasions prohibition from affinity, as such an act amounts to *touching in lust*; but it is certain that this does not occasion prohibition, because the carnal conjunction of the sexes does not stand as *procreation* on any other principle than as it may be the occasion of offspring, which it cannot possibly be from the performance of the act as above described.

IF a man repudiate his wife, either by a *complete* or a *reversible* divorce, it is not lawful for him to marry her sister until the expiration of her *Edit**.—*Shafëi* maintains that it is lawful, because by either of those forms of divorce the former marriage was completely dissolved, insomuch that if a man were to have carnal knowledge of his repudiated wife during her *Edit*, knowing the illegality of the same, he would be liable to the punishment for whoredom.—To this our doctors reply, that whatever the nature of the divorce may have been, whether reversible or complete, the marriage with the first sister does still, in fact, continue during her *Edit*, in virtue of the continuance of several of its effects, such as maintenance, and custody, and inability to marry another man; neither does it appear, in the book of divorce, that any punishment for whoredom is specified in the

A man cannot marry the sister of his repudiated wife during her *Edit*.

* The time of probation which a divorced woman is to wait before she can engage in a second marriage, in order to determine whether or not she be pregnant by the former. See Book IV. Chap. XII.

case of the husband having carnal connexion with his repudiated wife within the term of her *Edit*; although, according to the book of *punishments*, he would incur it, because, by the act of divorce, the husband's right of cohabitation is dissolved, and consequently any subsequent cohabitation with her would bear the construction of whoredom; but yet his other rights are not dissolved (as was above observed,) wherefore, if he were to marry the second sister before the expiration of the former's *Edit*, it would amount to a marriage with two sisters at one time, which is forbidden.

Marriage
with slaves;

A master may not marry his female slave, nor a mistress her bondsman, because marriage was instituted with a view that the fruit might belong equally to the father and the mother, and mastership and servitude are contradictory to each other, wherefore it is not admissible that offspring should thus be divided between the master and the slave.

and with
Kitâbees;

MARRIAGE with a *Kitâbee* woman is legal, according to the word of GOD, "WOMEN ARE LAWFUL TO YOU, SUCH AS ARE *Mahsanas* "OF THE SCRIPTURAL SECTS:" (the term *Mahsana* does not, in this passage, imply a *Muslimite*, but merely a woman of chaste reputation *.)—Free *Kitâbee* women, and those who are slaves, are equal in point of matrimonial legality, as shall be demonstrated hereafter.

and with
Majoofees.

It is unlawful to marry a *Majoofee* woman, GOD having said "YE MAY HOLD CORRESPONDENCE WITH THE *Majoofees* THE SAME AS WITH THE *Kitâbees*, BUT YE MUST NOT MARRY THEIR DAUGHTERS, NOR PARTAKE OF THEIR SACRIFICES."

and with
Pagans;

It is unlawful to marry a *Pagan* woman, according to the words

* This comment upon the text is meant as an exception to the general definition of the term *Mahsana*, as explained in the laws concerning slander, Book VII. Chap. V.

of the KORAN, "MARRY NOT A WOMAN OF the *Polytheists* UNTIL
"SHE EMBRACE THE FAITH."

A *Mussulman* may marry a woman of the *Sabeans*, she believing and with
the scriptures, and professing faith in the prophets; but if she worship *Sabeans*.
the stars, and believe not in any of the divine scriptural revelations,
it is unlawful to marry her,—such being idolators.—The diversity of
opinion which is recorded between *Haneefa* and the two disciples,
originates in their different ideas with respect to the *Sabeans*; each
arguing according to his own premises, for *Haneefa* accounts the
Sabeans to be *Kitábees*; whereas the two disciples consider them as
worshippers of the stars.

It is lawful either for a man or a woman to marry during the *Ibrám** of pilgrimage.—*Shafeï* alledges that it is unlawful. And the Marriage
same difference of opinion obtains in the case of a *Mobrim* † contracting during pil-
in marriage a woman to whom he is guardian.—*Shafeï* supports his grimage.
opinion upon a precept of the prophet, "MOHRIMS marry not, nor
"cause to marry."—In opposition to this, however, our doctors pro-
duce the instance of the prophet himself, who married *Meyemoona*
whilst he was a *Mobrim*; and with respect to the traditionary precept
cited by *Shafeï*, as above, it is to be regarded as solely applying to the
act of carnal conjunction; that is to say, the word *Nikkab* ‡ in that
sentence is to be construed into *Wuttee* §,—as if he had said, "Let not
"MOHRIMS hold carnal connexion, nor MOHRIMS admit men to such
"connexion."—This indeed is rather a weak comment, since the
word *Nikkab* has never been construed into the admitting of man
to the commission of the carnal act: but the better principle upon
which to answer it is that from the grammatical construction of the

* The period of the pilgrims remaining at *Mecca*.

† A pilgrim, whilst he remains at *Mecca*.

‡ Meaning *conjunction* in its primitive sense, and *marriage* in its occasional sense.

§ Literally *conjunction*, but generally applied to the carnal act.

sentence,

sentence, the words of the prophet may be rendered into merely a *negative remark*, rather than a *positive prohibition*.

Mussulmans
may marry
female slaves.

It is lawful for a *Mussulman*, who is free, to marry a female slave, whether she be a *Muslima*, or *Kitábeea*, although he be in circumstances to marry a free woman—that is to say, able to pay a dower, and afford an adequate maintenance to such a woman.—*Shafei* says that a man cannot lawfully marry a *Kitábee* slave, he holding that it is not lawful for a freeman to marry any slave except of necessity, because by such an act he incurs the consequence of subjecting a portion of his body to bondage; that is to say, his seed (which is a portion of his body) by entering the womb of a slave, is born in bondage; necessity, therefore, he holds can alone legalize such a marriage, and consequently, that ability to pay the dower and maintenance of a free woman prohibits a freeman from marrying a slave; but from this rule he excepts *Muslima* slaves. — With our doctors, on the other hand, marriage with female slaves of every description is legal, because the text of the KORAN, on which the legality of marriage is founded, extends to all descriptions of women, to slaves as well as to those who are free:—and, with respect to what *Shafei* objects, that “*by such an act a man incurs the consequence of subjecting a portion of his body to bondage*,” it may be replied that, by marrying a slave, a man is only withheld from producing free children; but it is not thence to be concluded that he, *de facto*, subjects a portion of his body to slavery, as this portion (to wit, his seed) is neither free nor otherwise; and as a man is at liberty to abstain from producing the child itself, (either by *not* marrying, or by marrying a woman who is *barren*) it follows that he is certainly at liberty to abstain from producing it in a state of *freedom*.

A man already
wedded to a free woman
cannot marry a slave,

It is unlawful for a man already married to a free woman to marry a slave, the prophet having issued a precept to this effect, “*Do not marry a slave upon [along with] a free woman*.”—*Shafei* says that
the

the marriage of a slave upon a free woman is lawful to a man who is a slave; and *Malik* likewise maintains that it is lawful, provided it be with the free woman's consent.—The above precept, however, is an answer to both, as it is general and unconditional:—moreover, the legality of marriage is a blessing to males and females equally, but the enjoyment of it is by bondage restricted to *one half*, inasmuch that slaves can have only two wives, whereas freemen may legally have four, (as will be explained hereafter,) and slavery operating thus restrictively upon males does so equally upon females;—upon the former it operates by a restriction in point of *number*, as above; but since, with respect to females, this is impossible, it has its effect by a restriction in point of *circumstances*; for instance, by restricting the legality of the marriage of female slaves to certain particular circumstances, as in the present case, where it is admitted only under the circumstance of the man not having any free wives.

A man may lawfully marry a free woman upon a slave, the prophet having so declared:—moreover, a woman who is free is lawful under all circumstances, the principle of restriction beforementioned not operating with respect to such a woman.

but a man wedded to a slave may marry a free woman.

If a man marry a slave during the *Edit* of complete divorce of another wife who is free, it is null, according to *Haneefa*.—The two disciples alledge that it is valid, as under the circumstances now recited it does not amount to marrying a slave upon a free woman; whence it is that if a man were to make a vow that he would not marry another woman upon his present wife, and he were afterwards to divorce his wife, and to marry another woman during her *Edit*, he would not be forsworn. The argument of *Haneefa*, in this case, is that the marriage with the free wife does still in some shape remain, on account of the continuance of several of its effects; wherefore that with a slave during the term of the free woman's *Edit* is not admissible, on a principle of caution: contrary to the case of a *vow*, as recited

recited above, because there the intention of the vower goes only to express that he would not introduce another wife to the prejudice of her right of *Kiffm*; but her right of *Kiffm* * is annihilated by divorce.

Four wives
allowed to
freemen;

It is lawful for a freeman to marry four wives, whether free or slaves: but it is not lawful for him to marry more than four, because God has commanded in the KORAN, saying "YE MAY MARRY
" WHATSOEVER WOMEN ARE AGREEABLE TO YOU, TWO, THREE,
OR FOUR," and the numbers being thus expressly mentioned, any beyond what is there specified would be unlawful.—*Shafëi* alledges a man cannot lawfully marry more than one woman of the description of slaves, from his tenet as above recited, that "*the marriage of free-*
"*men with slaves is allowable only from necessity*;" the text already quoted, is, however, in proof against him, since the term *Niffa* [*women*] applies equally to free women and to slaves.

and two to
slaves.

It is unlawful for a man who is a slave to marry more than two women; *Malik* maintains that it is lawful for a slave to marry as many women as a freeman, he holding it as a principle, that a slave, with respect to marriage, is in every particular the same as a free person, inasmuch that (according to him) a slave is authorized to marry without his proprietor's consent.—The argument of our doctors, in this case, is that slavery operates to the privation of one half of the natural privileges and enjoyments, and the legality of four wives in marriage being of this description, it follows that the privilege of a slave extends to the possession of *two* wives only, in order that the dignity of freedom may be duly supported.

A man,
having the
full number

If a man, having four wives, repudiate one of them, it is unlawful for him to marry any other woman during the term of that

* Impartiality in cohabitation with his wives. See Chap. VI.

wife's *Edit*, whether the divorce, under which she stands repudiated, be reversible or complete. *Shafei's* doctrine differs from this. His reasoning, and the reply to it, are the same as in the case of a man marrying a sister of his wife during the term of the latter's *Edit*.

of wives allowed, cannot marry during the *Edit* of one of them.

A man may lawfully marry a woman pregnant by whoredom, but he must not cohabit with her until after her delivery.—This is the doctrine of *Haneefa* and *Mohammed*.—*Aboo Yoosaf* says that a marriage made under such a circumstance is invalid: if, however, the descent of the *Fætus* be known and established, the marriage is null, according to all the doctors.—The argument upon which *Aboo Yoosaf* supports his opinion as above, is, that the illegality of the marriage, in cases where the parentage of the *Fætus* is established, originates purely in a principle of tenderness towards the *Fætus*, and a *Fætus* is an object of this tenderness, although it be begot in adultery, since it is innocent of any offence; whence procuring the abortion of it is illegal; marriage, therefore, with a woman pregnant by adultery is invalid, equally with one where the parentage of the *Fætus* is ascertained, and for the same reason. Our doctors, upon this point, argue that the woman is lawful in matrimony, on the authority of the sacred writings, the KORAN saying “ALL WOMEN ARE LAWFUL TO YOU, EXCEPTING THOSE WITHIN THE PROHIBITED DEGREES:” and the prohibition of cohabitation until after delivery, is merely on account of the impropriety of sowing seed in a soil already impregnated by another, a prohibition which occurs in the traditions. With respect to what *Aboo Yoosaf* alledges, that “the illegality of the marriage in cases where the parentage of the *Fætus* is established, originates purely in a principle of tenderness towards the *Fætus*,”—it is altogether unfounded, because the nullity of the marriage in that case originates in a regard for the right, not of the *Fætus*, but of the father.

A man may marry a woman pregnant by whoredom;

It is unlawful to marry a woman taken in war, being pregnant at
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but not a captive taken in that state.

the time of her capture, because the parentage of her *Fætus* is ascertained *.

A man cannot contract his *Am-Walid* (being pregnant) to another:

IF a man contract his *Am-Walid*, who is pregnant by him, to another man, it is null, because the *Am-Walid* is accounted as the *Firâsh* of her master, or *partner of his bed*, insomuch that the parentage of her child is established by the law in him, independant of any formal claim or acknowledgment thereof on his part; wherefore, if the marriage were valid, it would induce the existence of a right to cohabitation in two individuals with one and the same woman, a right which is null, as it would occasion a doubtful parentage.

OBJECTION.—The *Am-Walid* being declared the *Firâsh* of her master, it would appear that his marriage of her to another would not be legal, although she were not pregnant.

REPLY.—The *Firâsh* right of a master in his *Am-Walid* is of but weak consideration; whence it is, that if he were to deny her child's descent from him, it would become bastardized on the instant, without any asseveration. His *Firâsh* right in her, therefore, not being of any account, independent of *pregnancy*, is not prohibitory to her marriage, unless as connected with that circumstance.

but he may so contract his enjoyed female slave.

IF a man have carnal connexion with his female slave, and afterwards contract her in marriage to another man, it is lawful; because an absolute slave is not accounted as a *Firâsh*, or partner of her master's bed, since, if she were to produce a child, the parentage would not be established in him unless he were to claim it.—But yet it is adviseable that the master, previous to contracting her to another person, suffer one term of her courses to elapse, so as to guard against the possibility of his seed mixing with that of the other.—It is to be remarked, in this place, that the marriage of the slave, under the circumstance now mentioned, being valid, it is lawful for her husband to have carnal

* As necessarily proceeding from some one of the *enemy*.

connexion with her immediately, and before her purification from her first succeeding courses, according to *Haneefa* and *Aboo Yoosuf*.—*Mohammed* alledges, however, that it will be laudable in the husband to abstain from carnal connexion with her until one complete term of her courses shall have elapsed, because it is possible that there may remain in her womb seed of her master,—wherefore it is requisite that it be purified of that seed, the same as in a case of the purchase of a female slave.—The argument of the two *Elders*, in this case, is that the institute of the law, legalizing her marriage, is in itself a proof that her womb is unoccupied, as the law does not admit any marriage to be legal but under that supposition; wherefore purification, in the present instance, is not made a rule, either *laudable* or *injunctive*: contrary to a case of *purchase*, that of a female slave being held lawful although she be pregnant.

IF a man marry a woman, knowing her to have been guilty of whoredom, he may lawfully have carnal connexion with her immediately, before her purification from her courses, according to the two *Elders*: but *Mohammed* deems it laudable that he have no such connexion with her until after her purification.—The reasoning of each upon this point is to the same effect as in the preceding case.

A NIKKAH MATÂT, or *usufructuary* marriage, where a man says to a woman “I will take *the use* of you for such a time for so much,” is void, all the companions having agreed in the illegality of it.—It is related in the *Nakl Saheeh*, that *Ibn Abbas* retracted from his first opinion and embraced that of the other companions:—for *Ibn Abbas* was first of opinion that the *usufruct* here mentioned is allowable; but *Alee* informed him that the prophet had declared it unlawful, upon which he retracted from his opinion of *usufruct* being allowable:—and *Ibn Abbas* having thus retracted, *all* the companions appear to have agreed concerning its illegality.

An *usufructuary* marriage is void;

and so also a
temporary
marriage.

A *NIKKAH MOWOKKET*, or *temporary* marriage,—where a man marries a woman, under an engagement of *ten days* (for instance) in the presence of two witnesses,—is null.—*Ziffer* asserts that such marriage is valid and binding, the condition expressed of a specified period for its continuance being of no effect; because a marriage is not to be held null on account of a null or illegal condition therein expressed.—The argument of our doctors is that a *temporary* marriage is of the same nature with a *usufructuary* marriage; and in all contracts regard is had to the *sense* rather than to the *letter*, wherefore a *temporary* marriage is null as well as a *usufructuary* marriage, whether the period specified be short or long; because the principle on which a contract of marriage falls under the description of *Matât*, or *usufructuary*, is its containing a specification of time; and the same is found in a *Nikkah Mowokket*, or *temporary* marriage.

Case of a
double mar-
riage by one
contract.

IF a man marry two women by one contract, one of whom is lawful to him, and the other prohibited, his marriage with the one who is lawful holds good, but that with the other is void, because in that only a cause of nullity is found: contrary to where a man puts together a freeman and a slave, and sells them by one agreement, as such sale is null with respect to both, because *sale* is rendered null by an invalid condition, and the consent to the contract of sale is required with respect to the *free* person, in order to the legality of it with respect to the *slave*; this is therefore an invalid condition, as shall be demonstrated in treating of *slaves*.—It is to be observed that the whole of the stipulated dower, in the case now recited, goes to her with respect to whom the marriage is lawful, according to *Haneefa*.—With the two disciples, on the contrary, the dower is divided into the *proper* dower to each *, and therefore she with respect to whom the marriage is legal receives the amount of her *proper* dower, and the

* That is to say, a dower suitable or proportioned to the rank and circumstance of each respectively.

remainder drops in favour of the husband; and the same is recorded in the *Mabsoot*.

IF a woman sue a man on a plea of marriage, declaring that *such an one had married her*, and produce evidence in proof of her affirmation, and the *Kâzee* accordingly declare her to be the wife of such a man, and it should so happen that the man had never been actually married to that woman, yet he may, after this, lawfully reside with her;—and this is a sign of the authority of a judicial decree (or order of the *Kâzee*) in regard to appearance: and if the woman desire carnal connexion, the man may lawfully hold such connexion with her;—and this is a sign of the authority of a judicial decree, in *reality*.—The authority of the judicial decree extending both to *appearance* and *reality* is a tenet of *Haneefa*; and is also found in a *prior* opinion of *Aboo Yoosaf*.—In a more *recent* opinion of *Aboo Yoosaf*, and with *Mohammed* and *Shafeï*, it is not lawful for the man to have carnal connexion with this woman, because the *Kâzee* has erred in his proof, as the witnesses bore false testimony, and an error in the proof destroys the authority of the decree in regard to *reality*; wherefore it is, in some measure, the same as if the witnesses were *slaves* or *infidels*, in which case the decree would have no authority either in *appearance* or *reality*; and so it would appear in the present instance likewise; but here the decree has authority in regard to *appearance*, on account that the witnesses gave a true testimony *in appearance*; yet it has no authority in *reality*, as their testimony is false *in point of fact*; whereas, where the witnesses are *slaves* or *infidels*, the decree is destitute of authority in *appearance* also, as the proof remains unestablished even *in appearance*, since the discovery of their being *slaves* or *infidels* is practicable.—The argument of *Haneefa* is that the witnesses are held, with the *Kâzee*, to bear true testimony, and this is *proof*, as it is impossible to ascertain whether their testimony be *actually* true: contrary to the *state of bondage*, or the *infidelity* of witnesses, as these are circumstances easily known and ascertained, wherefore their evidence is not *proof* in any way.

Case of marriage by a judicial decree.

way.—Now the decree being founded on the *proof*, and the authority of the decree, in respect to *reality*, being here possible, by previously taking the marriage for granted, as a matter of necessity, it follows that the decree has authority in respect to *reality*, in order that the contradiction between the two may be obviated in every shape,—for if she were not lawful to him in *reality*, it would *occasion* a contradiction between the two, instead of *obviating* a contradiction: contrary to a case of property claimed *generally* (that is to say, without any mention of the *cause* of propriety,) such as if a man were to claim a female slave generally, and bring false evidence, and the *Kázee* decree the slave to the plaintiff, and it afterwards appear that the witness bore false testimony,—for in this case the decree has authority in *appearance*, but not in *reality*, because the causes of propriety in the slave are several, such as *sale*, *purchase*, *gift*, and *inheritance*, and regard cannot legally be had to any one of these as being prior to the others, since no one of them has precedence of the others, and to regard the *whole* of them as prior, is impossible; wherefore the decree cannot possess any authority [in *reality*.] Observe that the previously taking the marriage for granted, as a matter of necessity, is on account that a decree signifies the promulgation of a thing which is established, and *not* the establishment of a thing which is *not* established,—for, if it were not previously taken for granted, it would follow that a decree signifies the establishment of a thing which is *unestablished*, wherefore the marriage is necessarily first taken for granted; and this is possible in the case of a claim of *marriage*, but not in a case of general *propriety*, for the causes of propriety there are multifarious, and no one of these has priority over the other;—in such a case, therefore, the regarding of any one cause of propriety as *prior* to the *others* is impossible.

CHAP. II.

Of Guardianship and Equality.

A WOMAN who is an adult, and of sound mind, may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardians; and this, whether she be a virgin or a *Siyeeba*.—This is the opinion of *Haneefa* and *Aboo Yoosaf*, as appears in the *Zâbir Rawâyet*.—It is recorded, from *Aboo Yoosaf*, that her marriage cannot be contracted except through her guardian. *Mohammed* holds that the marriage may be contracted, but yet its validity is suspended upon the guardian's consent: on the other hand, *Mâlik* and *Shafeï* assert that a woman can by no means contract herself in marriage to a man in any circumstance, whether *with* or *without* the consent of her guardians;—neither is she competent to contract her daughter or her slave, nor to act as a matrimonial agent for any one, so as to enter into a contract of marriage on behalf of her constituent; because the end proposed in marriage, is the acquisition of those benefits which it produces, such as procreation, and so forth; and if the performance of this contract were in any respect committed to *women*, its end might be defeated, they being of weak reason, and open to flattery and deceit.—*Mohammed* argues that this apprehension is done away by the permission of the guardian being made a requisite condition.—The reasoning upon which the *Zâbir Râwayet* proceeds in this case is that, in marrying, the woman has performed an act affecting *herself only*, and to this she is fully competent, as being *sane* and *adult*, and capable of distinguishing *good* from *evil*, whence it is that she is by law capacitated to act for herself in all matters of property, and likewise to chuse a husband; neither does a woman require her guardian to match her for any other reason than as she may, by that means, avoid the imputation which might be thrown upon

An adult female may engage in the contract without her guardian's consent.

unless the
match be
unequal.

her modesty if she were to perform this herself; for all which reasons a woman contracting herself in marriage is valid, independent of her guardian, although it should be an unequal match; but yet, in the latter case, the guardian is at liberty to dissolve the marriage.—It is recorded as an opinion of *Haneefa* and *Abou Yoosaf*, that the marriage is illegal if there be an inequality between the parties.—It is also recorded that *Mohammed* afterwards adopted the sentiments of the two elders upon this point, and agreed with them, that the marriage here treated of is lawful, and that its validity is not suspended upon the approbation of the guardian.

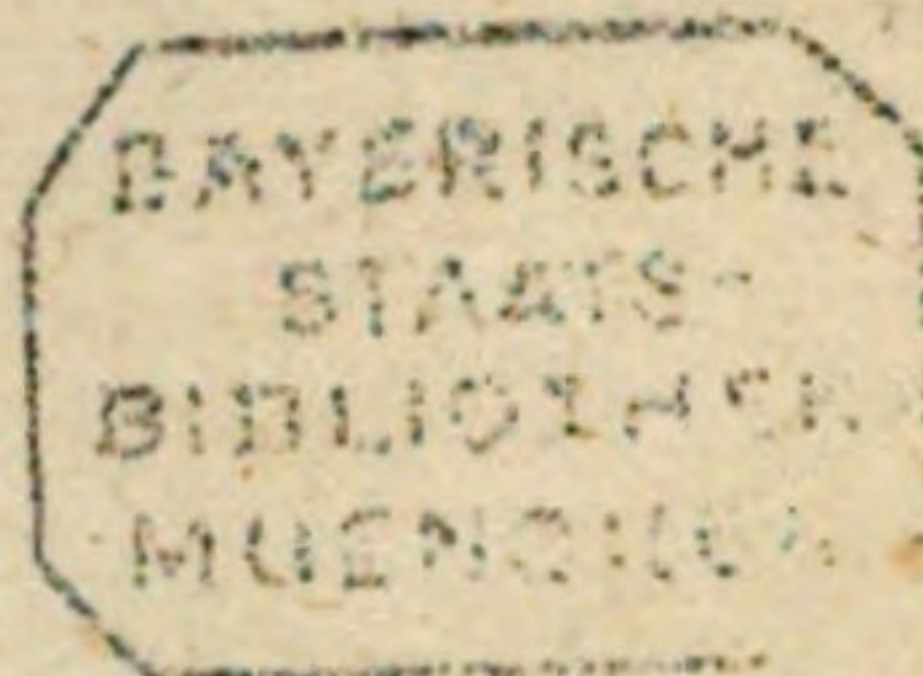
An adult
virgin cannot
be married
against her
will.

It is not lawful for a guardian to force into marriage an adult virgin against her consent.—This is contrary to the doctrine of *Shafei*, who accounts an adult virgin the same as an infant, with respect to marriage, since the former cannot be acquainted with the nature of marriage any more than the latter, as being equally uninformed with respect to the matrimonial state, whence it is that the father of such an one is empowered to make seizure of her dower without her consent.—The argument of our doctors is that the woman, in this case, is *free*, and a *Mokâtib*, (that is, subject to all the obligatory observances of the law, such as *fasting*, *prayer*, and so forth,) wherefore no person is endowed with any absolute authority of guardianship over her: contrary to the case of infants, over whom others are necessarily endowed with this authority, the understanding of such being defective, whereas that of an adult is held complete, in consequence of her having attained to years of discretion; for, if it were otherwise, she would not be subject to the observances of the law: from all which it follows that this woman is the same as an adult son; and that all her acts with respect to matrimony are good and valid, the same as his with respect to property; neither is her father empowered to make seizure of her dower without her consent expressed or virtually understood, as he is not at liberty to do so where she has forbidden him.

WHENEVER

WHENEVER a guardian, being the person empowered to engage in the contract, requires the consent of an adult virgin to a marriage, if she smile or remain silent, this is a compliance; because the prophet has said “*A virgin must be consulted in every thing which regards herself; and if she be silent it signifies assent;*” and also, because her assent is rather to be supposed, as she is ashamed to testify her desire; and *laughter* is a still more certain token of assent than silence: contrary to *weeping*, as this manifests abhorrence, since tears are most commonly the effect of grief, and not of joy, which is rarely the occasion of them, and therefore not to be regarded.—Some have said that if her laughter be in the manner of jest or derision it is not a compliance; nor is her weeping a disapproval, if it be not accompanied with noise or lamentation.

Tokens of
consent from
a virgin.



BUT if a marriage be proposed to an adult virgin by any other than her guardians, or by a *Walee Bayeed*, (or guardian of a more distant degree than her father, brother, or uncle,) her silence or laughter are not sufficient, until she shall from her lips pronounce an explicit compliance, because here her silence might be construed to arise from shyness towards such a person as being a stranger, and not from her consent to the match; and if it were even to be considered as a token of approbation, yet, under such a circumstance, it must be regarded as doubtful: but this is not the case if the person who proposes the marriage be acting merely as a *messenger* from her parent, or other immediate guardian; because to such an one the same signs of assent or dissent suffice as were specified in the preceding case.—It is here to be observed that, in requiring the woman's consent as aforesaid, it is requisite that the husband proposed to her be particularly named and described, so as to enable her to form some idea of him, whereby to ascertain her liking or dislike; but it is unnecessary to name or specify the dower; and this is approved, because marriage may be effected independent of any dower, as that is not essential to it.

IF a man contract an adult virgin in marriage to another without her knowledge, upon her receiving intelligence of it the same tokens suffice, to signify her compliance or approval, as were specified in the former case; that is to say, if she laugh or remain silent she consents, or if she weep she disapproves, provided the person contracting on her behalf be her guardian, and as such empowered so to contract; but if the contract be entered into by any other than her guardian, her consent is not understood until she shall have expressed the same in terms; and in this, as in the preceding case, the naming and describing of the husband to her is a requisite condition, but not the specification of the dower.—It is to be here observed that, if the person who conveys the intelligence to her be a *Fazoollee*, (that is, one who is neither an *agent* nor *guardian*,) number or integrity are conditions essential to the effect; that is to say, the information must be conveyed to her by *two* persons, or at least by one person of known good repute, according to *Haneefa*: but if the informer be acting merely as a *messenger* from the guardian, then neither number nor integrity are conditions, according to all the doctors. There are many cases similar to this with respect to the point at present in question, such as the recall of an ambassador, and the revocation of the privileges of a *Mazoon*.

Tokens of
consent from
a *Siyeeba*.

IF a guardian propose a marriage to a *Siyeeba*, (or woman with whom a man has had carnal connexion,) it is necessary that her compliance be particularly expressed by words, such as, “I consent to it,” because the prophet has said “*SIYEEBAS are to be consulted*,” and also because a *Siyeeba*, having had connexion with man, has not the same pretence to silence or shyness as a virgin, and consequently the silent signs before intimated are not sufficient indications of her assent to the proposed alliance.

Cases under
which a wo-
man is still
considered as
a *virgin*, in

IF the signs of virginity in a girl should happen to be effaced, either by leaping or any other exertion, or by a wound, or by frequent repetitions of the menses, yet she is still to be considered as a virgin; that

that is to say, her silence is a sufficient sign of her acquiescence in a marriage proposed, because she is still in reality a *virgin*, the law accounting every woman such who has not had carnal connexion with the other sex,—and consequently subject to the same shyness and reserve, from her not being accustomed to male society.—And if the signs of virginity be effaced even by *fornication*, yet she here also stands as a virgin, according to *Haneefa*. *Abou Yoosaf*, *Mohammed*, and *Shafeï*, are of opinion that the silence of such an one is not a sufficient token of consent to a marriage proposed, because she is actually a *Siyeeba*, since she has actually had connexion with man.—*Haneefa* in this case argues that people in general still suppose her to be a *virgin*, and hence consider her speaking as a breach of decorum, and consequently she will refrain from speech; her silence, therefore, must be held sufficient, lest her delicacy be violated: contrary to a case where a woman has lost her virginity either in an erroneous or an invalid marriage, as such an one would not be held a virgin with respect to the point in question, the law having manifested her carnal connexion, by instituting, in her case, observances which are a consequence of it, (such as *Edit* and *Dower*,) and by establishing the parentage of her child, whereas it recommends, as laudable, the concealment of fornication: this, however, is only where the case is not of a very notorious nature; for if a woman be known to abandon herself to fornication publicly, her silence would not be deemed sufficient.

respect to the
tokens of
consent.

If a man should say to a woman “ You have heard of your being “ contracted to me by our friends, and remained silent;” and she reply, “ No, I refused you,” or “ I dissented,” her declaration is to be credited.—*Ziffer* says that the declaration of the husband is to be credited, on account that silence is the original state of man, wherefore the person who adheres to that is the *defendant*; and the repulsion of the marriage is *supervient*, wherefore the person who adheres to that is the *plaintiff*; the case is therefore the same as where a person enters into a contract of sale under a condition of option, and pleads a rejection

Case of alle-
gation and
denial.

tion after the time of option has elapsed, and the other denies the rejection,—for in that case the declaration of the *denier* is to be credited, as he adheres to what is original, to wit, *silence*. Our doctors, on the other hand, say that the husband, in the present case, on account of his plea of *silence*, pleads the obligation of the contract of marriage, and consequently of his being the proprietor of the *woman's person**; and that the wife, by pleading the rejection, sets aside the claim of her husband, and must therefore be considered as the *defendant*, in the same manner as when a depositee pleads the restoration of a deposit, and the proprietor of the deposit declares that he had not returned it to him; because, in such a case, the declaration of the trustee would be credited, since he is in reality the *defendant*, although in appearance he be the *plaintiff*, for he frees himself from responsibility, and the original state of man is freedom, and an exemption from responsibility:—it is otherwise with respect to the case of a condition of option in sale, because the obligation of a sale is manifested after the lapse of the time of option, and therefore the person who pleads the rejection is *plaintiff* both in reality and in appearance. But here, if the husband should produce evidence in support of his silence, the marriage becomes established: if, however, he have no evidence, then an oath must not be imposed upon the wife, according to *Haneefa*.—This is one out of six cases in which an oath is incumbent upon the *defendant*, according to *Haneefa*, in opposition to the opinion of the two disciples; as will be fully treated of under the head of *sales*.

Infants may
be contracted
by their
guardians.

THE marriage of a boy or girl under age, by the authority of their paternal kindred, is lawful, whether the girl be a virgin or not, the prophet having declared “*Marriage is committed to the paternal kindred.*” *Mâlik* alleges that this is a power the exercise of which does not appertain to any of the kindred except the father.—*Shafëi* maintains that it belongs only to her father or grandfather: and he

* Arab. *Booza*, i. e. *Genitale Mulieris*. The phrase here adopted is to be thus understood, in *marriage* and *divorce*, throughout.

adds that this privilege does not appertain to any guardian whatever with respect to an infant *Siyeeba*, although he be her father or her grandfather.—*Málik* argues that power over freemen is established from necessity; but in the present instance no such necessity exists, as infants are not subject to any carnal appetite; yet it is vested in a father, on the authority of the sacred writings, contrary to what analogy would suggest:—but he also says that a grandfather, not being the same as a father, is not to be included with him. Our doctors, on the other hand, allege that the guardianship vested in a father is in no respect *contrary*, but is rather *agreeable* to analogy; because marriage is a point which involves in it many considerations, both civil and religious; and it is not perfect unless the parties be equal in degree according to the customary acceptation; and this equality is not always to be found; wherefore authority is vested in the father to contract his children during their minority, lest an opportunity of marrying them equally might be lost.—*Shafëi* argues, that entrusting the power of contracting marriage to any others than the father or grandfather would be oppressive upon the child, since it is to be supposed that no others are equally interested in its welfare or happiness; on which principle it is that kindred of a more distant degree are not empowered to act with respect to the *property* of infants, a matter of infinitely less importance than their *persons*, and consequently the acts of such, with respect to the latter, are unlawful *a fortiori*.—Our doctors argue, that affinity is a cause of affection in other relations the same as in the parents, and in whatever degree that may be defective, a provision is made against any evil consequence, by vesting in the child an option of acquiescence in the match after puberty, which acquiescence is necessary to constitute its validity: contrary to the case of acts with respect to *property*, because these are capable of repetition, since they are done with a view to the acquisition of gain, which cannot be obtained but by such repetition; and such being the case, if any loss should happen in the property, it is irretrievable; wherefore authority to act in respect to property is useless, unless it be absolute; and

and absolute authority cannot be established where there is any defect. The argument of *Shafëi*, in support of his second proposition, (to wit, “that this privilege does not appertain to any guardian whatever “with respect to an infant *Siyeeba*, although he be her father or grandfather,”) is, that her becoming a *Siyeeba* is to be considered as endowing her with sufficient understanding and capacity to act and judge for herself, on account of her being thus accustomed to male society, wherefore the law operates upon this consideration, without any regard to the absolute fact of her being endowed with such a portion of understanding or not, as that is a matter which does not readily admit of ascertainment. To this our doctors reply, that the infant requires a guardian whose tenderness and affection must be necessarily admitted; neither can her acquaintance with the other sex be considered as endowing her with any additional portion of understanding in regard to mankind, without concupiscence, which, in a child, does not exist.—It may also be further observed that the precept of the prophet already quoted is general and indiscriminate, and therefore includes all relations equally; which makes it a sufficient answer to *Málik* and *Shafëi*.

RELATIONS stand in the same order in point of authority to contract minors in marriage as they do in point of inheritance; but this authority, in the more distant relatives, is superceded by the existence of those of a nearer degree.

Case in which the marriage of infants continues binding after puberty.

If the marriage of infants be contracted by the fathers or grandfathers, no option after puberty remains to them; because the determination of parents in this matter cannot be suspected to originate in sinister motives, as their affection for their offspring is undoubted; wherefore the marriage is binding upon the parties, the same as if they had themselves entered into it after maturity.

BUT

BUT if the contract should have been executed by the authority of others than their parents, each is respectively at liberty, after they become of age, to chuse whether the marriage shall be confirmed or annulled.—This is according to *Haneefa* and *Mohammed*. *Abou Yoosaf* maintains that, in this case also, no option remains to them, since he considers all guardians to be the same as parents. To this *Haneefa* and *Mohammed* reply, that the more distant the guardians stand in their affinity to the parties, the less warm are their affections supposed to be; whence it is to be apprehended that, in contracting the marriage, self interest, or some other sinister motive, might operate in their minds to the disadvantage of the infant under their guardianship, an evil which is provided against by leaving an option to the infant after maturity.—It is to be observed, however, that this case, applying generally to all except the father and grandfather, includes the mother of the infant, and also the *Kázee*; because the former, as being a woman, is deficient in judgment; and the latter, as a stranger, in affection; and consequently a right of option must be reserved to the infant after maturity.—It is also to be remarked that, in dissolving the marriage, the decree of the *Kázee* is a necessary condition in all cases of option exerted after maturity: contrary to the rule in the exertion of a similar right of option after manumission; that is to say, if a master marry his female slave to any person, and afterwards emancipate her, she will have a right of option upon her emancipation; if she please the marriage continues, but if she disapprove it is dissolved; and the decree of the *Kázee* is not essential to such dissolution: but it is otherwise in the case of option after maturity; because that option is reserved with a view to guard against injury to the other rights of the parties, which might occur in a variety of instances, and which, if admitted, (as, if the marriage were *absolute*, they must be,) would be calculated to introduce many evils into the married state, since the guardian might, for instance, in executing the contract, agree to an inadequate dower, or to an unequal match; and as the dissolution of the marriage thus tends to affect other rights, a decree of the *Kázee*

Case which admits an option of acquiescence after puberty.

is

is essential thereto: but, in the case of the female slave, the right of option after emancipation is intended as a security against an evident injury to herself, as the husband's power over her is extended, and his authority, as well as her obligations, in many respects enlarged, by her emancipation from slavery; whence it is that this right of option is restricted to *female* slaves only, and does not extend to *males*, to whom the above principle would not apply; and such being the case, the dissolution of her marriage is to be regarded merely as the removal of a hardship from herself, in which the decree of the *Kâzee* is no way necessary, since all persons are entitled to relieve themselves from evil.

Tokens of
acquiescence
after puberty.

If the female, thus contracted during infancy, be of age when the marriage is first mentioned to her, and she upon that occasion remain silent, her silence, (according to *Haneefa* and *Mohammed*,) is to be construed into consent; but if she continue ignorant of the contract, her right of option is still reserved to her, until such time as she is informed of it, and remain silent as above.—*Mohammed*, in this case, makes it a condition that the girl be duly informed of the marriage, because she cannot exert her right of option without a knowledge of that circumstance, as the guardian may effect the marriage altogether unknown to her, and it may consequently happen that she never hears of it, and of course she would remain excused (as to her *silence*) on the ground of *ignorance*; but he does not make a knowledge of her right of option a condition, because that is an institute of the law, and ignorance is no plea with respect to an institute of the law, with which it is supposed that every person ought to be acquainted; the case is otherwise with a female slave, who being employed in the service of her master has no opportunity to obtain any knowledge of the law, wherefore ignorance of this point is a good plea in favour of the continuance of her right of option.

Circumstances which

THE right of option in a virgin, after maturity, is done away by her

her silence; but the right of option of a man is not done away by the same circumstance, nor until he expresses his approbation by *word* or by *deed*, such as presenting her dower, cohabiting with her, and so forth: and in like manner the right of option of the female after maturity, (in a case where the husband has enjoyed her before she attained to that state,) is not annulled until she expresses her consent or disapprobation in terms, (as if she were to say “I approve,” or, “I disapprove,”) or until her consent be virtually shewn by her conduct, in admitting the husband to carnal connexion, and so forth.

annul the
right of op-
tion.

THE option of maturity of a virgin is not protracted to the end of the assembly*; but that of a *Siyeeba*, or a youth, is not annulled even by the rising from the assembly, because the option of maturity is established by dissent, on account of the apprehension of the ends of marriage being defeated; and whatever is established by dissent is annulled by assent, on account of its advantage being obtained; now the silence of a virgin is assent, but not that of a *Siyeeba*, or a youth; wherefore the option of the former is annulled, but not that of the two latter:—moreover, a *Siyeeba*'s option of maturity † has not been established by the act of her husband, as is evident; and a circumstance which is not established by the act of the husband is not restricted to that assembly, since that only which is *delegated* ‡ is so restricted, as shall be hereafter demonstrated §. contrary to the option of *manumission*, as that is not annulled by silence, but is protracted to the end of the assembly, and annulled by the rising from the assembly, because the option of manumission is established by the act of the

Degree of the
continuance
of a right of
option after
maturity.

* Arab. *Majlis*, meaning the place or company in which she may happen to be at the time of her attaining maturity. It is treated of at large elsewhere. Vide *Index*.

† By *option of maturity*, and *option of manumission*, is meant, option of acquiescence after maturity, or after manumission.

‡ Namely a power of divorce.

§ See Book of Divorce, Chap. III.

master, namely, *emancipation*; and hence regard is had to the *Majlis* in this case, as well as in that of a woman endowed by her husband with an option of divorce.

Separation in
consequence
of option is
not *divorce*.

A separation between a husband and wife in consequence of option after maturity is not divorce, from whatever side it proceed, because it may with propriety proceed from the wife, whereas divorce cannot. And so also, separation in consequence of option after manumission is not divorce, for the same reason.

Rule of in-
heritance in
the marriage
of infants.

If a girl who has been contracted in marriage by her guardians, as already stated, should die before she attain maturity, her husband inherits of her: and, in like manner, if a youth so contracted would die before he attain maturity, his wife inherits of him;—and so also, if either should happen to die *after* maturity, without a separation having taken place;—because the marriage contract was regular and valid *ab origine*, and would remain so, until dissolved by the dissent of one or both of the parties in the event of their arriving at maturity; but this being precluded by the demise of one of them, the marriage continues good for ever; and consequently all the mutual privileges established in the parties by the marriage are irreversibly confirmed by the decease of either of them:—contrary to the case of a marriage contracted by an unauthorized person, where, if either of the parties were to die before assent being duly expressed, the other would not inherit; because, in this case, the existence of the marriage is suspended upon the consent of the parties, and is consequently rendered null by the demise of either previous to the declaration of their will in it; whereas, in the other case, the decease of either party, previous to maturity or separation, as aforesaid, does not *annul*, but rather *confirms* their marriage.

Persons in-
capable of
acting as

AUTHORITY to contract others in marriage is not vested in a slave, an infant, or a lunatic, because such persons, being considered in law
as

as incapable of acting for themselves, are incompetent to exercise any authority over others, *a fortiori*: moreover, this authority is established in guardians and others out of tenderness to persons who, from their situation, require attention and care, (such as infants and lunatics;) but this would not be manifested by committing the execution of marriage, on their behalf, to persons of the above descriptions.

guardians in marriage.

AN infidel cannot be vested with this authority with respect to a *Mussulman*, male or female, because the word of GOD says "HE DOETH NOT ADMIT INFIDELS TO ANY CLAIM UPON BELIEVERS;" and, if this authority were vested in *infidels*, it would be admitting them to such a claim: and hence also it is, that the evidence of *infidels* regarding *Mussulmans* is not admitted; and, upon the same principle, that *Mussulmans* and *infidels* cannot inherit of each other.

AN *infidel* is vested with this authority with respect to his children who are *infidels*, the word of GOD saying "INFIDELS MAY EXERCISE AUTHORITY OVER INFIDELS;" whence it is that the evidence of *infidels* regarding *infidels* is admitted, and that inheritance obtains among them.

IN defect of *paternal* relations, authority to contract marriage appertains to the *maternal*, (if they be of the same family or tribe,) such as the mother, or the maternal uncle or aunt, and all others within the prohibited degrees, according to *Haneefa*, upon a principle of benevolence.—*Mohammed* alleges that this authority is not vested in any except the *paternal* kindred; and there is also an opinion of *Haneefa* on record to this effect.—Of *Abou Yoosaf* two opinions have been mentioned; according to that most generally received, he coincides with *Mohammed*: and their arguments on this subject are twofold: FIRST, the prophet has declared "*Marriage is committed to the paternal kindred*," (as was before quoted;) SECONDLY, the only reason for instituting this authority is, that families may be preserved

Maternal relations may act in defect of the paternal:

from improper or unequal connexion; and this guard over the honour of a family is committed to the paternal relatives, whose peculiar province it is to take care that their stock be not exposed to any mean or debasing admixture, so as to subject them to shame.—The argument of *Hannefa* is, that authority to contract marriage is instituted out of a regard to the interest of the child, which is fully manifested by committing it to persons whose relation to the infant is so near as to render them interested in its welfare.

or the *Mawla*
of an infant
female slave:

IF the *Mawla** of an infant female slave, having emancipated her, should contract her in marriage, it is lawful, although she have relations within the prohibited degrees upon the spot, provided there be not among them any relations of the *paternal* description, because the *Mawla* stands as a paternal relation with respect to her.

or the *Magistrate*, in
defect of a
natural guardian:

WHERE persons are destitute of any natural guardian, the authority of contracting them in marriage is vested in the *Imâm* or the *Kâzee*; because the prophet has, in his precepts, declared “*Persons being destitute of guardians have a guardian in the Sultan.*”

or the nearest
guardian
present, in the
absence of
others.

IF the parents, or other first natural guardians of an infant, should be removed to such a distance as is termed *Gheebat-Moonkatat*, it is in that case lawful for the guardian next in degree to contract the infant in marriage.—*Ziffer* and *Shafëi* allege that it is not lawful, because this authority is vested in the first guardian as a *right*, in order that the family may be preserved from the shame occasioned by the infant forming a degrading connexion; and this being a *positive right*, cannot be annulled by the absence of the party, as the law does not admit *absence* to be destructive of a *right*; and hence it is that if the absent guardian were to contract the infant in marriage on the spot where he

* Meaning the *emancipator*. For a full definition of this term, see the *Emancipation of Slaves*.

may at that period happen to be, it is lawful; moreover, a relation of a more distant degree is not vested with authority in the existence of a nearer relative, since the more distant is precluded by the nearer.—The argument of our doctors is that authority to contract minors in marriage is instituted out of regard to their interest, as was already noticed; whence it is that this authority is not admitted over any, excepting such as are incapable of paying the necessary attention to their own interest; and this regard is not manifested in committing the business of marriage to the nearer guardian, who is absent, as from the exertion of his prudence or good sense no advantage can, in that situation, be easily derived; the authority, therefore, in this case, devolves to the guardian next in degree who is present:—moreover, as, in case the first guardian were to die, or to become insane, the authority would devolve to the next in degree, so does it likewise in the present case. And with respect to what *Ziffer* and *Shafei* have advanced, that “if the absent guardian were to contract the infant in marriage on the spot where he may at that period happen to be, it is lawful,”—the assertion is not admitted: but even granting this, it is still to be observed, that although the more distant guardian be further removed from the infant in point of consanguinity, yet, being upon the spot, he is enabled to transact for the latter, with the advantage of immediate and local knowledge; and *vice versa* of the other guardians. Thus they stand upon an equal footing with respect to authority; and whoever of them may enter into a contract of marriage on behalf of the infant, the same holds good, and is not liable to be set aside.—By the absence termed *Gheebat-Moonkatat*, is to be understood the guardian being removed to a city out of the track of the caravans, or which is not visited by the caravan more than once in every year; some, however, have defined it to signify any distance amounting to *three days journey*.

If a lunatic woman have two guardians, one her son and the other her father, the authority of disposing of her in marriage rests with the

The guardianship over a lunatic woman rests with her son.

the former and not with the latter, according to *Haneefa* and *Aboo Yoosaf*. *Mohammed* says that the father is her guardian in this respect, as feeling a more lively interest in her than the son.—The argument of the two *Elders* is that a son is prior to all others of the parental kindred; and the right of guardianship goes by this right of priority, in preference to affection: thus any paternal kinsman (such as the son of the father's brother, for instance,) is in this respect prior to the maternal grandfather, although the natural affection of the latter be admitted to be the strongest.

SECTION.

Of KAFÂT, or EQUALITY.

Definition of
Kafât.

KAFÂT, in its literal sense, means equality.—In the language of the law it signifies the equality of a man with a woman, in the several particulars which shall be immediately specified.

Equality necessary in
marriage,

IN marriage regard is had to equality, because the prophet has commanded, saying, “*Take ye care that none contract women in marriage but their proper guardians, and that they be not so contracted but with their equals*; and also, because the desirable ends of marriage, such as cohabitation, society, and friendship, cannot be completely enjoyed excepting by persons who are each others equals, (according to the customary estimation of equality,) as a woman of high rank and family would abhor society and cohabitation with a mean man; it is requisite, therefore, that regard be had to equality with respect to the husband; that is to say, that the husband be the equal of his wife; but it is not necessary that the wife be the equal of the husband, since men are not degraded by cohabitation with women who are their inferiors.—It is proper to observe, in this place, that one reason

reason for attending to equality in marriage is, that regard is had to that circumstance in confirming a marriage and establishing its validity; for if a woman should match herself to a man who is her inferior, her guardians have a right to separate them, so as to remove the dishonour they might otherwise sustain by it.

EQUALITY is regarded with respect to lineage, this being a source of distinction among mankind; thus it is said “a *Kooraisb* is the equal of a *Kooraisb* throughout all their tribes;” that is to say, there is no pre-eminence among them, between *Hashmees* and *Nisfees*, *Teyemees* or *Adwees*; and in like manner they say, “an *Arab* is the equal of an *Arab*.”—This sentiment originates in a precept of the prophet to this effect; and hence it is evident that there is no pre-eminence considered among the *Kooraisb* tribes: and with respect to what *Imám Mohammed* has advanced, that “pre-eminence is not regarded among the *KOORAISH* tribes or families, excepting where the same is notorious, such as the house of the *KHALIFS*,” his intention in this exception was merely to shew that regard should be had to pre-eminence in that particular house, out of respect to the *Khiláfet*, and in order to suppress rebellion or disaffection; and not to say that an original equality does not exist throughout. The *Kooraisbes* are the descendants of *Názir* son of *Kanáan*, as is universally known.—*Ibn-Hijr* has said that the *Kooraisbes* are descended of *Kibr* the son of *Málik*. The term *Kooraisb* is a diminutive of *Kursh*, which means a body of people, or congregation; and this appellation was originally applied to them, because they were accustomed to trade through different cities and countries, and after being thus scattered, used to re-assemble at *Mecca*. The *Arabs* are those who derive their descent from a stock anterior to *Názir*, or (according to *Ibn-Hijr*) anterior to *Kibr*. in point of tribe or family;

THE *Binno Babala* tribe are not the equals of *Arabs* of any other description whatsoever, they being notorious throughout *Arabia* for every

every species of vice; and none of those before mentioned esteem them as upon an equality with themselves.

in point of
religion;

MAWÂLEES, that is to say, *Ajims*, who are neither *Kooraisbees* nor *Arabs*, are the equals of each other throughout, regard not being had among them to *lineage*, but to *Islâm*.—Thus an *Ajim* whose family have been *Mussulmans* for two or more generations is the equal of one descended of *Mussulman* ancestors;—but one who has himself embraced the faith, or he and his father only, is not the equal of an *Ajim* whose father and grandfather were *Mussulmans*; because a family is not established under any particular denomination (such as *Mussulman*, for instance,) by a retrospect short of the grandfather.—This is the doctrine of *Haneefa* and *Mohammed*. *Aboo Yoosaf* says that an *Ajim* whose father is a *Mussulman* is the equal of a woman whose father and grandfather are *Mussulmans*.

AN *Ajim* who is the first of his family professing the faith is not the equal of a woman whose father is a *Mussulman*.

in point of
freedom;

Equality in point of *freedom* is the same as in point of *Islâm*, in all the circumstances above recited, because bondage is an effect of infidelity, and the properties of meanness and turpitude are therein found.

in point of
character;

REGARD is to be had to equality in piety and virtue, according to *Haneefa* and *Aboo Yoosaf*; and this is approved, because virtue is one of the first principles of superiority, and a woman derives a degree of scandal and shame from the profligacy of her husband, beyond what she sustains even from that of her *kindred*.—*Mohammed* alleges that positive equality in point of virtue is not to be regarded, as that is connected with religion, to which rules regarding mere worldly matters do not apply, excepting where the party, by any base or degrading misconduct,
(such

(such as a man exposing himself naked and intoxicated in the public street, and so forth,) may have incurred derision and contempt.

EQUALITY is to be regarded with respect to *property*, by which ^{in point of fortune;} is understood a man being possessed of a sufficiency to discharge the dower and provide maintenance; because if he be unable to do both, or either, of these, he is not the equal of any woman; as the dower is a consideration for the carnal use of the woman, the payment of which is necessary of course; and upon the provision of a support to the wife depends the permanency of the matrimonial connexion; and this is therefore indispensable *a fortiori*.—This, according to some, is found in the ability to support a wife for *one month* only; but others say for *a year*. By a man possessing sufficient to enable him to discharge the dower, is understood his ability to pay down that proportion of it which it is customary to give immediately upon the marriage, and which is termed *Modjil*, or *prompt*; the remainder, termed the *Mowjil*, or *deferred*, it is not usual to pay until a future season; and hence it is that the ability to pay that part of the dower is not made a condition.—*Aboo Yoosaf* teaches that regard is to be had only to the man's ability to support his wife, and not to the discharge of the dower, because the latter is of a nature to admit of delay in the payment, but not the former; and a man is supposed to be sufficiently enabled to pay the dower where his father is in good circumstances. According to the doctrine of *Haneefa* and *Mohammed*, however, the fortune of the man is to be considered *in general*, (without regard to any particular ability,) insomuch that a man who may even be qualified both to pay the dower and to provide subsistence, yet may not be held the equal of a woman possessed of a large property; since men consider wealth as conferring superiority, and poverty as inducing contempt. *Aboo Yoosaf*, on the other hand, maintains that wealth is not to be regarded in this respect, since it is not a thing of a stable or permanent nature, as property may be acquired in the morning and lost before night.

and in point
of *profession*.

EQUALITY is to be regarded in *trade* or *profession*, according to *Abou Yoosaf* and *Mohammed*.—There are two opinions recorded of *Haneefa* upon this point; and there is also an opinion related of *Abou Yoosaf*, that the profession is not to be regarded, unless where it is of such a degrading nature as to oppose an unfurmountable objection; such for instance as barbers, weavers, tanners, or other workers in leather, and scavengers, who are not the equals of merchants perfumers, druggists, or bankers.—The principle upon which regard is to be had to trade or profession is, that men assume to themselves a certain consequence from the respectability of their callings, whereas a degree of contempt is annexed to them on account of the meanness thereof.—But a reason, on the other hand, why trade or profession should not be regarded is, that these are not *absolute* upon a man, since he is at liberty to leave a mean profession for one of a more honourable nature.

Case of a
woman con-
tracting her-
self on an in-
adequate
dower.

IF a woman contract herself in marriage, consenting to receive a dower of much smaller value than her *proper* dower*, the guardians have a right to oppose it, until her husband shall agree either to give her a complete *proper* dower, or to separate from him.—This is according to *Haneefa*.—The two disciples maintain that the guardians are not possessed of any such authority; and their argument is, that whatever the dower may be above ten *Dirms* is the right of the woman, and no person is to be opposed in relinquishing that which is her own; as where a woman, for instance, chuses to relinquish a part of the dower, after the amount of it has been specifically stipulated.—To this *Haneefa* replies, that the guardians assume a certain degree of respect and consideration from the magnitude of the dower; and its smallness is an occasion of shame to them; wherefore regard is had to that, as well as to equality: contrary to the case of a woman relinquishing her claim to any part of her dower after it has

* The nature of the *proper* dower is fully explained in the next chapter.

been specifically stipulated, because no disgrace falls upon the guardians from such dereliction.

IF a father should contract in marriage his infant daughter, agreeing to a very inadequate dower; or, if he should contract his infant son, engaging for an extravagant dower, yet this is legal and valid with respect to them.—This, however, is not lawful to any excepting a father or grandfather, according to all the doctors.—The two disciples have said that diminution or excess in the dower is illegal only where it is very apparent; that is to say, a contract of marriage, involving any very disproportionate excess or deficiency of dower, is not held by them to be legal; because the authority of a father or grandfather to contract infants in marriage is founded upon the supposition of their regard for the interest of those infants, and therefore, where this regard does not appear, the contract is null; and in agreeing for a *deficient* dower on behalf of a female infant, or for an *excessive* one on behalf of a male, no regard to their interest whatever is manifested.—Similar to this is a case of purchase or sale; that is to say, if a guardian were, on behalf of an infant, to sell a thing for less than its value, or to buy a thing for more than it is worth, at an excessive disproportion, such sale or purchase would be invalid; and so also in marriage:—and hence it is that no person is empowered, with respect to deficient or excessive dowers, excepting a father or grandfather.—To this *Haneefa* replies, that the law here rests solely upon whatever affords an argument of tenderness for the infant, and that is found in nearness of affinity; and in marriage there are many considerations of more weight and moment than the dower, whereas, in transactions which concern *property*, that only is a consideration; and where that which is the *end* appears to be defeated, their authority is done away.—But with respect to others than the father and grandfather, no regard is had to affinity as an argument of tenderness in the present case, since that exists in them in a smaller degree.

Case of a father contracting his infant child on a disproportionate dower.

A father may contract his infant child to a slave.

IF a man contract his infant daughter to a slave, or his infant son to a female slave, it is lawful.—The compiler of the *Hedaya* observes that this is according to *Haneefa*, who argues that the father's neglect of equality in this instance must be supposed to arise from some other considerations of greater weight, wherefore the said contract of marriage is lawful; but if it should appear that the parent has adopted such a match without any view to a particular advantage, the contract is in that case null: and the two *Elders* coincide with *Haneefa* in this opinion.—According to the two disciples the contract is illegal, because it involves a twofold disadvantage with respect to the infant;—a want of equality in the first instance; and secondly, a want of residence, as a slave cannot be or remain any where but with the owner's consent.

SECTION.

Of a Power of AGENCY to contract MARRIAGE.

Agents in marriage, and their powers.

AGENTS in matrimony are persons employed and authorized by the parties concerned to enter into contracts of marriage on their behalf; and the power so delegated is termed *Wikalit-ba-Nikkah*.

IT is lawful for a nephew to contract the daughter of his uncle in marriage with himself.—*Ziffer* alleges that this is unlawful.

IF a woman give authority to a man to contract her in marriage with himself, and he accordingly execute the contract in the presence of two witnesses, it is lawful. *Ziffer* and *Shafei* affirm that this is illegal, because no person is competent to transfer and make himself the

the proprietor of that which is transferred; as in a case of *sale*, for instance, where, if the proprietor constitute a person his agent of sale with respect to any particular property, and the agent sell the same to himself, both the agency and the sale are void, no man being competent to act as the transferrer of property, and to become himself the master of that property.—*Shafëi*, however, alleges that a guardian may lawfully contract his ward to himself on the plea of *necessity*, since, if he were not allowed this privilege, she might never be married; but a mere *agent* has no such plea, because in this case her guardian will contract her*.—Our doctors, on the other hand, argue that an agent in matrimony is merely a *negotiator*, and the obligations of the contract do not, in any respect, affect the contractor of a marriage; neither would any objections which may arise apply to the simple negotiation, but to the rights and obligations which it involves: contrary to the case of *sale*, as cited by *Ziffer* and *Shafëi*, because there the agent appears to be acting not merely as a *negotiator*, but also as a *principal*, in the contract of sale, and is consequently affected by its obligations. It may be remarked in this place, that as the contractor of a marriage is merely a *negotiator*, so where a person becomes empowered to contract on both sides, his single declaration “I have contracted” comprehends both the declaration and the acceptance, and consequently there is in this instance no occasion for two separate sentences †.

If a man should contract in marriage the slave of another without the owner's consent, the validity of the deed is suspended upon the will of the Owner: if he approve, it is lawful; if he disapprove, it is null.

Cases of a contract executed by an unauthorized person.

In the same manner, if a man contract a woman in marriage without her knowledge in the presence of two witnesses, or if a

* This proceeds upon a supposition that the guardian is not within the prohibited degrees, and that no other proper person offers.

† See the beginning of this Book.

woman contract a man in marriage without his consent, the validity is suspended upon the same circumstance.—This is an opinion of our doctors; because they hold that in a case of a contract entered into by a *Fazoolee*, or unauthorized person, and to which there exists any person who has a right to assent, the same stands as a complete contract, the validity of which is suspended upon that person's approbation.—*Shafei* maintains that all acts whatever of a *Fazoolee* are null; because the use of a contract is for the purpose of establishing its effect, like that of *sale*, for instance, which is used for the purpose of establishing a right of property, and that of *marriage*, for the purpose of establishing a right of enjoyment; and a *Fazoolee* is incapable of establishing the effect, on account of his want of authority; wherefore the act of the *Fazoolee* is nugatory.—The argument of our doctors is, that the foundation of the contract, namely, declaration and acceptance, has proceeded from a competent person, (that is, from one who is sane and adult,) and has reference to its proper subject; neither can any injury be sustained if the contract be executed, inasmuch as there exists, in respect to it, a person who has a right of assent, and who, if he think proper, will signify such assent, and give the contract force; or, if otherwise, will reject it: and in reply to what is urged by *Shafei*, we observe that the effect of a contract is sometimes deferred to a period subsequent to the **time** or date of the contract; as in a contract of sale under a condition of option, where possession is deferred until such time as the condition of option drops.

If an unauthorized person say to two persons “Be ye witnesses that I have married such a woman who is absent;” and afterwards the woman should hear of it, and consent, yet the marriage is void: but if, on the unauthorized person speaking as above, a third person were to say “I have married that woman to that man,” and the woman on hearing of it should consent, the marriage is lawful. And, in like manner, if a woman should say “Be ye witnesses that I have contracted myself to such a man who is absent,” and the man should

should afterwards hear of it and consent, the marriage would notwithstanding be void; but if, on the woman thus speaking, a bystander were to say, "Be ye witnesses that I give consent on behalf of such a person;" and the man, on hearing of it, should give his consent, the marriage is valid. This is the doctrine of *Haneefa*. *Abou Yoosaf* alleges that if a woman were to say "I have contracted myself to such a man," (he being absent,) and the man, on afterwards receiving intelligence of this, were to declare his assent, the marriage is valid. In short, according to *Haneefa* and *Mohammed*, one person is not competent to act as a *Fazoolee* in a contract of marriage, either on behalf of both parties, or as a *Fazoolee* on one side, and a principal on the other; whereas *Abou Yoosaf* holds a contrary opinion. But, if two unauthorized persons enter into a contract of marriage on behalf of both parties,—that is to say, one on the part of the man, and the other on that of the woman,—or, if the persons enter into such a contract, one as a *Fazoolee*, and the other as a principal,—it is lawful, with our doctors (*Haneefa*, *Mohammed*, and *Abou Yoosaf*.) The argument of *Abou Yoosaf*, in the case before stated, is that one person may in marriage stand as two, and the declaration of that person may be considered as two declarations *, (whence it is that if one person be authorized by both parties, the marriage is effected by his single declaration;) and, in the case of an unauthorized person, the only difference is, that the validity of the contract remains suspended upon the ultimate consent of the parties, as in a case of *Khoola*, where, if a man were to declare that "he had repudiated his wife by the form of *Khoola* for such a consideration," (the wife being absent,) and she were afterwards to receive intelligence of this, and to assent, the *Khoola* is lawful; and so also, in a case of *divorce* or of *manumission*, where, if a man were to declare that he had divorced his wife for one thousand *Dirms*, (she being absent,) and intelligence of this reach her, and she consent,—or, if a man declare that "he has emancipated

* That is to say, "as the *proposal* and the *acceptance*, or, in other words, "as the *declaration* and the *consent*."

"such

“such an one, his slave, for a recompense of one thousand *Dirms*,” (the slave being absent,) and the latter, hearing of this, assent, the proceeding is lawful.—To this *Haneefa* and *Mohammed* reply that, in the case before recited, the declaration of the unauthorized person, “I have contracted such a woman to such a man,” or, “I have married such a woman,” amounts to a contract on *one* part only, which is not valid, wherefore the legality of it is not suspended upon the consent of the parties, as its completion rests on the reply, which is not approved, unless it proceed from a person present in the assembly or company where the contract is made, and during the continuance of that company; and, like a sale, it is incapable of being protracted to any period beyond that assembly: but where a person, on the contrary, acts on the authority of both parties, the contract is valid, because here his declaration applies equally to both; and where the contract is entered into by two unauthorized persons, (acting for, or, as it were, *representing* the respective parties,) it is complete, as it here possesses all the essential properties of a contract; and so also in cases of *Khoola*, or of divorce, or manumission for a compensation, (as cited by *Aboo Yoosaf*,) because in such instances the declaration stands as a *conditional vow* on the part of the husband or the master, so as to be binding upon him, and from which he cannot with propriety retract; and hence the engagement is completed solely by *him*.

Cases of the matrimonial agent exceeding or acting contrary to his commission.

IF a man commission another, as his agent, to procure him a wife, and the agent should contract him to two women, by one declaration*, his marriage is not valid with either, for, being unlawful with both, on account of its contradicting the tenor of the commission with which he was charged, and unestablished with either, on account of unspecified *priority*, a separation from both must necessarily ensue.

* That is to say, by one contract.

IF a person commission another, as his agent, to contract him in marriage to a woman, and the agent should contract him to a female slave the property of some third person, it is valid, (according to *Haneefa*,) because here the agent appears to have acted in strict conformity with the tenor of his commission, as the term *woman* is general, applying equally to the whole sex, to slaves as well as to others; nor can there be any doubt, since the case supposes the slave to be the property, *not* of the *agent*, but of some *third* person; — neither is there any impropriety in it, as the case supposes the authorizer not to be previously married to a free woman. — The two disciples allege that a marriage thus made by an agent is illegal, unless it be contracted with a woman who is the equal of the constituent; because, by the term *woman*, generally expressed, is to be understood such as it is customary to wed, and men commonly marry their *equals*; the term *woman*, therefore, thus indefinitely expressed, means such a woman as it is usual for such a man to marry. — To this *Aboo Haneefa* replies, that in custom there is an indefinite latitude, it being common for men, even of considerable rank, to marry female slaves, as well as free women who are their equals; and such being the case, the agent is not restricted to any particular description of women, as the term *woman* must be taken generally: and even admitting that custom does thus prevail in marriage, it may be replied that custom is of two different descriptions, one applying to *words*, (as *Daba*, for instance, a term applying to beasts in general, but which custom hath restricted to a *horse*;) and the other to *actions*, (such, for instance, as men clothing themselves in new garments on the festival of *Yd*;) now, in the present case, custom applies to *facts*, and not to *terms*, and therefore does not admit the construction of being restrictive. — It will hereafter be shewn, in treating of *Agency*, that the two doctors regard equality, in the present case, upon another principle, to wit, that a man not being necessitated to marry any woman, of course his desire of being married by an agent relates only to a woman who is his equal.

C H A P. III.

Of the *Mibr*, or *Dower*.

Marriage
without a
dower is
valid.

A MARRIAGE is valid, although no mention be made of the dower by the contracting parties, because the term *Nikkah*, in its literal sense, signifies a *contract of union*, which is fully accomplished by the junction of a man and woman; moreover, the payment of dower is enjoined by the law, merely as a token of respect for its object (the woman,) wherefore the mention of it is not absolutely essential to the validity of a marriage:—and, for the same reason, a marriage is also valid, although the man were to engage in the contract on the special condition that there should be no dower: but this is contrary to the doctrine of *Malik*.

Ten *Dirms*
the lowest
legal dower.

THE smallest dower is ten *Dirms**.—*Shafëi* says that whatever sum may be lawful as the price of a commodity in purchase and sale, is lawful as a dower, because the dower is the right of the woman, and consequently it must depend upon herself to determine the amount of it. The arguments of our doctors in this case are twofold; FIRST, a precept of the prophet, which expressly declares “*There is no dower under ten DIRMS;*” SECONDLY, the law enjoins a dower with a

* The value of the *Dirm* is very uncertain. Ten *Dirms*, according to one account, make about six shillings and eightpence sterling.

view to manifest respect for the wife, wherefore it must be fixed, in its smallest degree, at such a sum as may be respectable; and this is ten *Dirms*, that being the lowest amount of a theft inducing the punishment of amputation of a limb, which shews that such sum is the least that can be regarded in an important or respectable light.

IF a man assign, as a dower, a sum under ten *Dirms*, yet his wife shall receive the whole ten *Dirms*, according to our doctors.—*Ziffer* alleges that she shall receive a *Mibr-Misl*, or *proper* dower; because where the sum specified is so small as not to bear the construction of a dower, it is the same as if none whatever had been named.—The argument of our doctors is, that the impropriety of naming or stipulating so small a sum is on account of the injunction of the law, which cannot be fulfilled with less than ten *Dirms*, and the woman will certainly be satisfied with ten *Dirms*, as she had agreed to accept of less than ten: neither is it proper to take an example, in this case, from that in which no dower whatever has been named, because it may sometimes happen that a woman may grant the right of possession without any return, and out of pure love; but no woman will agree to a *trifling* return. And here, if the husband were to divorce the wife before consummation, her due on account of the dower is five *Dirms*, according to our three doctors. *Ziffer* holds that she is in this case entitled only to a *Matât*, or present, the same as would be due where no dower had been named.—The meaning of the term *Matât* shall be hereafter fully explained.

Case of a
dower
of ten *Dirms*.

IF a person specify a dower of ten or more *Dirms*, and should afterwards consummate his marriage, or be removed by death, his wife, in either case, has a claim to the whole of the dower specified, because, by *consummation*, the delivery of the return for the dower,

The wife entitled to her whole dower, upon the consummation of the marriage, or the death of the husband;

namely, the *Booza*, or *woman's person**, is established, and therein is confirmed the right to the consideration, namely, the dower; and, on the other hand, by the decease of the husband the marriage is rendered complete, and every thing becomes established and confirmed by its completion, and consequently is so with respect to all its effects.

and to one half, upon divorce before consummation.

If the husband, in the case now stated, were to divorce his wife before consummation, or *Khalwat Saheeb* †, she, in this case, receives half her specified dower; God having commanded, saying, “ IF YE
“ DIVORCE THEM BEFORE YE HAVE TOUCHED THEM, AND HAVE
“ ALREADY SETTLED A DOWER ON THEM, YE SHALL PAY THEM
“ ONE HALF OF WHAT YE HAVE SETTLED.”

OBJECTION.—It would here appear that the whole dower should of right drop, because the object of the contract reverts to the woman untouched, the same as in sale, where the whole price drops, if the buyer and seller break off the contract.

REPLY.—There are two analogical conclusions applicable to this subject; FIRST, what is recited in the above objection; SECONDLY, it would appear that the whole dower is due, because the husband did not make use of his possession, but suffered it to pass from him untouched of his own choice; as in sale, where the whole price of a purchase is due, if the purchaser suffer the goods to perish in the hands of the seller; and these two conclusions directly contradicting each other, they are both abandoned, and we adhere to the sacred text as above.—This case supposes the divorce to take place before *Khalwat*, or retirement, because that with a wife is held, by our doctors, to amount to carnal knowledge, as shall be hereafter explained.

* Literally, *Genitale arum Mulieris*.

† Retirement, *solus cum sola*, where there is no legal or natural impediment to the commission of the carnal act. It is elsewhere translated *complete retirement*.

IF a man marry a woman without specifying any dower, or on the express stipulation that she shall not have a dower, and he either have carnal connexion with her, or die, she is in that case entitled to her *Mibr-Misl*, or *proper* dower.—*Shafëi* alleges that where the husband dies, nothing whatever remains due: but many of his disciples and followers admit that the woman's *proper* dower is due in case of carnal connexion.—The argument of *Shafëi* is that the dower is purely a right of the woman; whence it is in her power to relinquish it *a priori*, for the same reason as she is at liberty to remit it afterwards.—To this our doctors reply that in the dower are involved rights of three different descriptions; the FIRST, the right of the law, which is that it shall not consist of less than ten *Dirms*, (as has been already said;) the SECOND, the right of the guardians, which is that it shall not be short of the woman's *proper* dower; and the THIRD, the right of the woman, which is that it shall become her property. Now the right of the *law* and the right of the *guardians* are to be regarded in the *execution* of the contract, but not its *continuance*; consequently, in the continuance, the dower is the right of the woman solely; and hence it is that she is empowered to give it up or relinquish it in the *continuance* of the contract, but not *a priori*.

Where no dower is stipulated in the contract, the wife receives her *proper* dower;

IF a man marry a woman without any specification of a dower, or on condition of there being no dower, and divorce her before carnal connexion, the woman in this case receives a *Matât*, or present;—God having commanded, saying, “GIVE HER A PRESENT, THE
“RICH ACCORDING TO HIS WEALTH, AND THE POOR ACCORDING
“TO HIS POVERTY:” thus a present is incumbent upon the husband, on the authority of the sacred writings:—but this is contrary to the doctrine of *Málik*.—The *Matât*, or present, here mentioned, is to consist of three pieces of dress, composed of such materials as are suitable to the woman to whom it is given; and these are, the *Dirra*, or shift; the *Khoomár*, or veil; and the *Mulhaffet*, or outer garment. The quantity is determined at three pieces of dress, on the authority of

or a *present*, in case of divorce before consummation.

of *Aysha* and *Ibn Abbas*.—From the restriction of the present to such materials as are suitable to the woman, it would appear that, in the adjustment, regard should be had to the *woman's* state and condition, (and such is the doctrine of *Koorokbee*,) because it is a sort of substitute for the woman's *proper* dower:—but the more approved doctrine on this point is, that regard be had solely to the state and condition of the *husband*, because of the words of the sacred text before quoted, “ —THE RICH ACCORDING TO HIS WEALTH, AND THE POOR ACCORDING TO HIS POVERTY.”—It is to be remarked, that the present must not exceed in value one half of the woman's *proper* dower, nor be worth less than five *Dirms*: the same is recorded in the *Mabsoot*.

Case of a
dower specified
after
marriage.

IF a man marry a woman without naming any dower, and the parties should afterwards agree to a dower, and specify its amount, such dower goes to the woman, if the husband either consummate the marriage or die; but if he divorce her before consummation, she receives only a present. With *Aboo Yoosaf* she, in this case, receives one half of the dower specified, (and such also is the opinion of *Shafei*,) because here the dower has been made obligatory and specifically determined, and consequently one half is due, according to the words of the text, “ YE SHALL PAY THEM ONE HALF OF WHAT YE
“ HAVE SETTLED.” The argument of our doctors is that, in the present case, the specification of the dower identifies a thing which was due on account of the contract, to wit, the woman's *proper* dower; and as this is incapable of subdivision, consequently that which is its substitute cannot be halved.—With respect to the text above quoted, it is to be regarded as applying solely to what has been agreed to and specified at the period of the contract: this being agreeable to what is customary.

Case of an
addition
made to the

IF a man make any addition to the dower in behalf of his wife subsequent to the contract, such addition is binding upon him.—This
is

is contrary to the doctrine of *Ziffer*, as shall be demonstrated in treating of an increase of price in a contract of sale.—But although such after-addition to the dower be thus approved, yet it drops in consequence of divorce before consummation.—According to an opinion of *Abou Yoosaf*, the woman is entitled to the half of the *additional*, together with that of the *original*, dower.—The cause of this difference of opinion is that, with *Haneefa* and *Mohammed*, nothing is halved but what has been rendered obligatory, and specifically determined; whereas *Abou Yoosaf* holds whatever is engaged for *after* the contract to be the same as that which is made obligatory *in* the contract, and therefore considers it as subject to the same rule.

dower after marriage.

IF a woman exonerate her husband from any part, or even from the *whole*, of the dower, it is approved; because, after the execution of the contract, it is her sole right, (as was already explained,) and the case supposes her dereliction of it to take place at a subsequent period.

A wife may remit the whole dower.

IF a man retire with his wife, and there be no legal or natural obstruction to the commission of the carnal act, and he afterwards divorce her, the whole dower in this case goes to her.—*Shafei* maintains that she is here to receive no more than her *half* dower, because the husband cannot obtain possession of the object of the contract but by actual coition; and the right to the dower is not corroborated and confirmed without enjoyment.—The argument of our doctors is, that the woman has completed her part of the contract, by delivering up her person, and by removing all obstructions, which is the extent of her ability; her right to the recompense is therefore confirmed and corroborated; in the same manner as in a case of sale, where if the seller have offered delivery of the goods sold, and there be nothing to obstruct seizure on the part of the purchaser, and the latter neglect to make seizure, he is considered as having made seizure, and the purchase is afterwards

Case of *Khalwat-Sabeeh*, or retirement.

afterwards as a trust in the hands of the seller, and the whole of the price is obligatory upon the purchaser.

Circumstances in which retirement does not imply consummation.

IF a man retire with his wife whilst one of them is sick, or fasting in the month of *Ramzán*, or in the *Ibrám* of a pilgrimage, whether obligatory * or voluntary, or of a visitation at the shrine of the prophet, (termed an *Amrit*,) or whilst the woman is in her courses,—this is not regarded as a *Khalwat-Sabeeh*, or complete retirement, inasmuch that if the man were to divorce his wife after such a retirement, the woman is entitled to her half dower only; because all the above circumstances are bars to the carnal act;—sickness, from the weakness and imbecility with which it is attended, or from its rendering the commission of the carnal act injurious to one or other of the parties;—and fasting in *Ramzán*, because it would induce upon the party a necessity of expiation and atonement;—and pilgrimage, or visitation, because it would induce a necessity of atonement by sacrifice;—and the woman's courses, because they oppose an obstruction both natural and legal.—But if one of the parties be observing a *Nisf* [voluntary] fast only, the woman is entitled to her whole dower, because the breach of such a fast is a matter of indifference: a fast of atonement, or in consequence of a vow, is the same as a voluntary fast in this respect, and for the same reason.

Exception.

Case of retirement of an eunuch.

IF a *Majboob* eunuch retire with his wife, and afterwards divorce her, she is entitled to her whole dower, according to *Haneefa*.—The two disciples maintain that the half dower only goes to her, on account that a *Majboob* is still more incapacitated than a sick person: contrary to the case of an *Ineen*, (or one naturally impotent,) because the point of law rests upon the existence of the instrument of generation, which is there found, but not in the former case.—*Haneefa*, on

* All *Mussulmans* are required, once in their lives, to make a pilgrimage to *Mecca*, which is termed *Hidj-Farz*, or ordained pilgrimage.

the

the other hand argues, that all which is due on the part of the woman is the delivery of her person, (by admitting the husband to feel and touch her,) and this being, to the extent of her ability, completely performed, it follows that the consideration is completely due to her.

IT is incumbent upon the woman to observe an *Edit*, (or appointed term of probation,) after the divorce, in all the cases here recited, for the sake of caution, on a principle of propriety, from the apprehension or possibility of her womb being occupied by seed.—The *Edit* is, moreover, a right of the law and of the *fœtus*; and credit is not to be given to the parties that they have not committed the carnal act, because this (in precluding the necessity of *Edit*) would amount to an extinction of rights (as above specified) distinct and separate from these of the parties: but it is otherwise with the *dower*, because that is a matter of *property*, the right in which cannot be decided upon principles of caution, (like the *Edit*,) nor under any circumstance admitting of doubt; the dower, therefore, is not due, where retirement is not of the description of *Khalwat-Sabeeh*.—*Kadooree*, in his commentary upon his own work, has observed that, if the obstruction to the carnal act be merely of a *legal* nature, (such as *fasting*,) the observance of *Edit* is incumbent, because here the natural ability to the performance of the act is supposed: but if the obstruction be of a *positive* nature, (such as *sickness* or *infancy*,) the *Edit* is not requisite, because the ability to perform the act does not here exist.

It is laudable to bestow a *Matât*, or *present*, upon every woman divorced by her husband, excepting two descriptions of women, namely, one whose dower has been stipulated, and whose husband divorces her before consummation,—and one whose dower has not been stipulated, and who is also divorced before consummation; for in their behalf a present is not merely *laudable*, but *incumbent*.—*Shafëi*

Cases in which the present to the wife is *laudable*, or *incumbent*.

says that a present is incumbent in behalf of every divorced woman, excepting one whose dower has been stipulated, and who is divorced before consummation; because the present is made incumbent in the way of a gratuity, or compensatory gift, from the husband, on account of his having thrown the woman into a forlorn state by his separation from her; but, in the excepted instance, the half dower is a substitute for the present, as divorce is here a dissolution of the contract, and the present need not be bestowed repeatedly. The argument of our doctors is, that the present is a substitute for the *proper* dower in the case of a *resigned* woman, (that is, a woman who resigns herself to her husband without a dower,) on account that, as the *proper* dower drops, the *present* becomes incumbent; because, in a contract of marriage, a return is essential: the *present*, therefore, is a substitute for the *proper* dower; and such being the case, it must not be required in addition either to the whole dower, which is the *original* thing, or to any part of it: whence the *present* is not incumbent where any part of the dower is due. As to what *Shafei* advances, that “the *present* is made incumbent in the way of a gratuity, “or compensatory gift, from the husband, on account of his having “thrown the woman into a forlorn state by his separation from her,” —we reply that this act of his does not amount to an *offence*, as the husband is privileged by the law so to do, wherefore no recompense is due from him on that account; and hence it is that the *present* is regarded merely as *respectful* and *laudable*.

Case of a reciprocal bargain between two contractors.

IF a person contract his daughter, or his sister, in marriage to another, on the condition of the other bestowing a sister or daughter in marriage upon him, so as that each contract shall stand as a return for the other, respectively, both the contracts are lawful.—*Shafei* maintains that both the contracts are null, as they make one half of the woman's *person*, reciprocally, a *dower*, and the other half the subject of marriage; because, where the person marries his daughter to the other, and also constitutes her the dower for the other's daughter, it follows

follows that the daughter's person* is divided between the other person and his daughter,—one half to that person, as husband, in virtue of the marriage, and the other half to his daughter as her dower; and as the matrimonial possession, or propriety, is incapable of being participated, (since it is ordained as a *complete* enjoyment, and not as a *participated* one,) it follows that the bargain is nugatory.—To this our doctors reply, that the contractor has named, as a dower, a thing incapable of being so, (since a woman's person, in the sense it here bears, is incapable of being the property of a *woman*;)—but yet the contract holds good, and a *Mibr Misl*, or *proper* dower, remains due, [to each of the women,] the same as where *wine* or a *hog* are assigned as a dower.—With respect to what *Shafei* urges, that “the matrimonial propriety is incapable of being participated,”—it is admitted; but this participation is not induced in the present case, as the person of either of the daughters is not made the right of the other daughter in virtue of the contract.

IF a free man marry a woman, on the condition, in return, of serving her for a stated time, (*a year*, for instance,) or of teaching her the *Koran*, yet her *proper* dower is incumbent upon him notwithstanding, according to *Haneefa* and *Aboo Yoosaf*. *Mohammed* has said that she is, in this case, to receive a sum amounting to the estimated value of his service for one year. But if a slave, by his owner's consent, marry a woman on the same terms, it is lawful, and the woman is entitled to the stipulated service only.—*Shafei* is of opinion that the woman is entitled merely to the service stipulated in either of these cases; because whatever may be lawfully received as a fixed return, is capable of constituting a dower, since a mutual exchange may be thereby effected, and consequently the case is the same as if the man had married the woman on condition of a stated service to be performed by *another person*, or on a stipulation of himself watching her flocks for a stated period. The arguments of our doctors, on this point, are

Case of marriage on a condition of service from the husband.

* Arab. *Booza*, i. e. *Genitale Mulieris*.

twofold;—FIRST, the possession of a woman's person is not to be sought, (that is to say, *to desire*, it is not lawful,) except in lieu of property; and teaching the *Koran* is not property; neither does *usufruct* constitute *property*, (according to the sentiments of our doctors,) because that is not substantial or permanent, whereas *property* is a thing of a *permanent* nature, and what constitutes *actual wealth*; service, therefore, not being property, to seek the possession of a woman's person, in return for the service of a freeman, is unlawful:—contrary to a case where a *slave* obtains a woman in marriage on the condition of his serving her, since *here* possession is sought for that which is actual property, the service of a slave being considered as such, because this comprehends a surrender or delivery of the slave's person, and the person of a slave is actual property, and of course the *usufruct* thereof; wherefore it is analogous to the bestowing of the slave himself as a dower: but with a husband who is free this cannot be the case: SECONDLY, it is not lawful that a woman should be in a situation to exact the service of her husband who is a freeman, as this would amount to a reversal of their appointed stations, for one of the requisites of marriage is, that the woman be as a servant, and the man as the person served; but if the service of the husband to the wife were to constitute her dower, it would follow that the *husband* is as the servant and the *wife* as the served; and this being a violation of the requisites of marriage, is therefore illegal: but it is otherwise with the service stipulated to be performed by another free person, with that person's consent, as this offers no violence to the requisites of the contract; and so also, in the case of service of a slave, because the service performed by a slave to his wife is, in fact, performed to his *master*, by whose consent it is that he undertakes it; and the same with the case of tending flocks, because this is a service of a permanent nature, and admitted to be performed for wives, and therefore does not violate the requisites of marriage; for the service of the husband to his wife, as a dower, is prohibited only as it may be degrading to the former; but the tending of flocks is not a degrading office. *Mohammed*, according to his tenets, holds (as was already observed) that the woman

is,

is, in this case, entitled to receive a sum amounting to the estimated value of the service, because he maintains that what was stipulated (to wit, the service) is property, but of such a nature as it is not in the husband's power to make delivery of, since by such an act he would violate the requisites of marriage; the case, therefore, is the same as if a man were to marry a woman, assigning, as a dower, a slave, the property of another, in which case he would have to pay the woman the value of such slave.—*Haneefa* and *Abou Yoosaf*, on the other hand, hold that the woman is entitled to a *proper* dower; because they maintain that the service here stipulated is not property, as a woman cannot legally exact service of her husband, being a freeman, in any situation whatever; lest a reversal of stations should be induced, as was just observed; the naming, therefore, of *service* as a dower, is the same as naming wine, or a hog; for, not being capable of legal delivery, it is not a subject of appreciation; and such being the case, recourse is had to the original rule in defect of any dower, and this dictates a *proper* dower.

IF a man marry a woman on a dower of one thousand *Dirms*, and the woman make seizure of the said thousand, and then present the same to him, and he take possession of such gift, and afterwards divorce her before consummation, the husband, in this case, has a claim upon his wife for five hundred *Dirms*, because he is not considered, in law, as having received, in the form of the *gift*, that identical thing which becomes obligatory upon his wife in consequence of divorce before consummation, since money is incapable of identification either in the fulfilment or the annulment of contracts. So also, if the dower consist not of money, but of articles of weight or measurement of capacity, as *iron* or *copper*.—But if the wife were to make a gift to her husband of the thousand *Dirms*, without having herself been in possession of the same*, and he were afterwards to divorce

Cases of a wife remitting or returning the dower to her husband, either *wholly*, or *in part*.

* That is to say, *relinquishes her right to it*.

her before consummation, in this case neither party has any claim whatever upon the other. This proceeds upon a favourable construction; for analogy would suggest that the husband should receive from his wife the amount of half the dower, because the whole dower remains untouched with the husband in consequence of the gift, which amounts to a discharge, but the wife does not appear to be discharged from what becomes obligatory upon her in consequence of divorce before consummation.—The reason for a more favourable construction of the law upon this point is, that the identical thing which becomes obligatory upon the wife in favour of the husband, in consequence of divorce before consummation, has come to him, in his being discharged from half the dower, (through the wife's gift,) and the end being thus obtained, any difference in the manner in which it is obtained will not be regarded,—that is to say, the end was, that the husband should recover half the dower after divorce before consummation, and that end has been obtained, not indeed through *divorce*, but through *antecedent gift*, which answers the same purpose.

IF a man marry a woman on a dower of one thousand *Dirms*, and the woman make seizin of five hundred *Dirms*, and afterwards make a gift to her husband of the whole thousand,—as well of the portion in her possession, as of that which she has not received,—or of the latter only,—and the husband afterwards divorce her before consummation, neither party, in this case, has any claim upon the other, according to *Haneefa*.—The two disciples maintain that the husband has, in this case, a claim upon the wife for one half of that proportion of which she had possession; because they conceive of a *part* from the *whole*;—that is to say, if the wife were to make a gift of the *whole* dower to her husband, without having herself made previous seizin of any part thereof, the husband has no claim to resume any thing out of it;—and, on the contrary, if she were first to make seizin of the dower, and then to make a gift of the same to her husband, he would have a claim

claim of resumption upon her for *one half*; and consequently, when she has made seizure of any particular *part* or *portion* of it, he has a claim of resumption upon her for the half of that part of which she had made seizure; and again, on the other hand, because a gift of any part of the dower to the husband amounts to an abatement with respect to that part, and is therefore altogether excluded from the contract*; and consequently, when the gift is of that half which had remained unseized, it is the same as if the contract had regarded the *half* only; (as where a seller, for instance, makes a gift of half the price of the commodity sold, in which case it is the same as if the price agreed upon were no more than the remaining half;) and such being the case, it follows that the proportion of abatement (in consequence of gift) becomes altogether excluded from the dower, and that the half of which seizure had been made stands as the complete dower;—and as, where seizure had been made by the wife of her whole dower, and she had presented the same to her husband, he would still (upon divorce before consummation) have a claim of resumption upon her for one half, (as has been shewn in a former case,) so here, in like manner, he has a claim of resumption for a moiety of the seized proportion, that standing as the *complete dower*. The argument of *Abou Haneefa* in this case is, that the end of the husband hath been already obtained, in a moiety of the dower remaining untouched with him without any return; wherefore, upon divorcing his wife before consummation, he would have no occasion to make any resumption: and with respect to what the two disciples advance, that “an abatement becomes altogether excluded from the contract,” it may be replied, if this were to be admitted, it would follow that, in a case where a man marries a woman on a dower of twenty *Dirms*, (for instance,) and the

* The phrase in the original is remarkable, “*LEHAZA YEWLUKKO B’ASSIL AL “AKID,”*—“and [therefore is connected with the origin of the contract;—that is to say,—with a period antecedent to the contract, and consequently not included in it. The term here adopted appears to be the clearest by which the translator could express the sense.

woman makes a gift to him of fifteen *Dirms* out of the twenty, ten *Dirms* would remain obligatory upon the husband; because, the abatement being excluded from the contract, it would be the same as if he had married her upon a dower of five *Dirms*; and if he had married her upon such a dower, he would be bound for ten *Dirms*, on the principle of law, that if a man marry a woman on a dower of fewer than ten *Dirms*, ten *Dirms* are obligatory upon him: this idea would consequently lead to an unjust and unfounded conclusion, and is therefore inadmissible.

IF a man marry a woman on a dower of one thousand *Dirms*, and she make a gift to him of a part less than the half,—two hundred, for instance,—and take possession of the remainder, and the husband afterwards divorce her before consummation, he has, in this case, (according to *Aboo Haneefa*,) a claim of resumption upon her for such a sum as, together with what she had previously bestowed upon him, makes a moiety of the whole, namely (in the supposition before mentioned) three hundred *Dirms*:—according to the two disciples, on the contrary, his claim of resumption is for the half of what the woman had made seizure of, namely, four hundred *Dirms*.

The same
when the
dower consists
of effects.

IF a man marry a woman on a dower consisting of certain specified effects, and she make a gift of the same to him, either before or after seizure, and he afterwards divorce her before consummation, he, in this case, has no claim of resumption whatever upon the woman.—This proceeds upon a favourable construction.—Analogy would suggest that he should have a claim to the amount of the value of half the effects, because here it becomes obligatory upon the woman to make restitution of half the dower, as was already explained, and she is incapacitated from making restitution by delivery of half the actual effects, in consequence of her gift; wherefore it would appear that she should make it by paying the estimated value of one half.—But the reason for a more favourable construction of the law
in

in this case is, that the husband, who is entitled to recover from the woman one half of what she had taken possession of, in consequence of his having divorced her before consummation, has already actually obtained this, (through her gift;) whence it is that the woman would not be at liberty to give her husband any other thing in lieu of those effects, because the consideration consists of a thing capable of identical specification, and of course the said effects, which have been in possession of the woman, and by her made over in gift to her husband, constitute a dower of a certain specific description; thus the husband appears to have received that actual thing which had been rendered obligatory upon the wife by divorce before consummation:—contrary to the case of a dower consisting of a *debt*; for here, if the wife were to make seizure of such debt, and then to make a gift of the same to her husband, and he afterwards to divorce her, as above, he would, in this case, have a claim of resumption upon her for the value of one half of the dower, because a debt of this nature is, like money, incapable of identical specification:—and contrary, also, to a case where a woman, having taken possession of effects, as a dower, (as was stated in the preceding case,) *sells* such effects to her husband, because, in this case, they have come back to him for a consideration, and his claim is to the recovery of the half of her dower without *any* consideration.—And if the dower consist of an animal, or of effects, which are a debt upon the husband*, the rule is the same as in the case of one consisting of specified effects; because the thing seized by the woman is of such a nature as, if she had herself borrowed it, must be restored by her in substance; and articles of this description are all capable of identical specification.

If a man marry a woman on a dower of one thousand *Dirms* †,

Cases of stipulation in

* That is to say, an animal, or effects, which had been borrowed or procured upon credit by the husband.

† This case proceeds on the supposition of one thousand *Dirms* being of less value than the woman's *proper* dower.

behalf of the
wife.

on a condition that he is not to carry her out of her native city,—or that he is not to marry, during his matrimonial connexion with her, any other woman, in this case, if he observe the condition, the woman is entitled to the above specified dower only, as that consists of a sum sufficient to constitute a legal dower, and she has agreed to accept it; but if he should infringe the condition, by either carrying her out of her native city, or marrying another wife, she is in this case entitled to her *proper* dower, because he had acceded to a condition on behalf of the woman which was advantageous to her, and that not being fulfilled, the woman is not supposed to be satisfied with the thousand *Dirms*, and must therefore be paid her complete *proper* dower; the same as in a case where a woman had agreed to accept of one thousand *Dirms* as a dower, on condition of being treated with reverence, and not subjected to any laborious work; or, of being presented with a rich dress, and so forth.

IF a man marry a woman, stipulating the dower at *one* thousand *Dirms*, provided he should not carry her out of her native city, but stay and reside there with her,—or at *two* thousand, if he should carry her thence,—in this case, if he continue to reside with her in the said city, she is entitled to the thousand *Dirms* only; but if he carry her thence she becomes entitled to her *proper* dower, where that does not exceed *two* thousand; nor fall short of *one* thousand.—This is according to *Haneefa*. The two disciples say that both conditions are equally valid, inasmuch that, as if he were to continue to reside with her in the city aforesaid, she would receive the *one* thousand *Dirms* only, so if he carry her thence, she becomes entitled to *two* thousand.—*Ziffer*, on the other hand, maintains that both the conditions are null, and that the woman shall, in either event, receive her *proper* dower, where that does not exceed *two* thousand *Dirms*, nor fall short of *one* thousand.—This case is founded upon what occurs in the book of *Hire*, where a man says to a taylor “ If you make me up this robe “ within the day, I shall pay you one *Dirm*; or if you finish it “ by

“by to-morrow, you shall have half a *Dirm*.”—as will be hereafter explained.

If a man marry a woman, agreeing to give her, as a dower, either of two slaves unspecified,—as if he were to say—“Make one of these “two the dower,”—and the slaves be of different value,—in this case, where the woman’s *proper* dower is under the rate of the slave of less value, she receives that one; or if it exceed the rate of the more valuable slave, she receives that one; and if it exceed the former, and fall short of the latter, she then receives her *proper* dower. This is according to *Abou Yoosaf*.—The two disciples allege that the least valuable slave goes to her, in all these circumstances. But if the husband divorce her without consummation, she in that case becomes entitled to half the price of the least valuable slave only, according to all the doctors.—The argument of the two disciples, in this case, is that the *proper* dower is not to be held obligatory, unless where the *stipulated* dower is of such a nature as renders an obligation with respect to that impossible; but it is possible with respect to the *least valuable* slave, because that one is *undoubted**, and is therefore obligatory; the same as in a case of *Khoola*, or of manumission, for a compensation “of “one thousand, or of two thousand,” or “of *this* slave, or of *that* “slave†;” in which case, whatever is the least value named is held to be the compensation either for *Khoola* or for manumission, as there can be no doubt concerning it; and so in this case also.—The argument of *Haneefa*, in reply to the two disciples, is that the *proper*

Cases of a dower consisting of property unidentified,

* That is to say, although, with respect to the slave of *greater* value, a doubt might be entertained, yet with respect to the *other* there can be none, since that is the lowest terms offered by the party himself.

† This relates merely to the point of law in cases of vague and indefinite expression; for instance, in *Khoola*, where the wife may say to her husband, “I will give you one or “two thousand *Dirms*, or either of my slaves, *Zeyd* or *Amir*, for my divorce,”—in which case the law always determines the proposed compensation at the lowest value mentioned.

dower is the radical obligation in a contract of marriage, like the price of a purchase, in a contract of sale, as that is the most equitable, being a medium adjustment, neither over nor under, and consequently it is not to be deviated from, except in cases where the specification of the dower is perfect and complete; but here the specification is not complete, since neither slave has been particularly mentioned by the husband, in settling the dower, but both indefinitely: contrary to a case of *Khoola*, or of manumission for a compensation, since in neither of these is there any radical compensatory obligation understood, independent of some particular previous agreement; for if a slave were to say to his master, "emancipate me," and the master were to reply "thou art free;" or if a wife were to say to her husband, "grant me *Khoola*," and the husband were to reply "I have granted *Khoola*," no obligation whatever would remain upon the slave or the wife; whereas, on the contrary, if a woman were to say to a man "marry me," and he were to reply "I have married you," her *proper* dower would be incumbent upon him; but where the rate of the more valuable slave falls short of the *proper* dower, the wife has virtually acceded to the abatement; and, in like manner, where the rate of the least valuable slave exceeds the *proper* dower, the husband has virtually agreed to the excess; and she then receives one or other of the slaves, as the case may be.—It is here to be observed that, if divorce take place before emancipation, the wife is to receive from her husband a present in addition to half the price of the least valuable slave: this is a rule established by custom, and must be complied with, as an obligation on the part of the husband, although the value of the present should even exceed the half price of such slave.

or undescribed.

IF a man marry a woman, assigning her, as a dower, an animal undescribed, it is approved, and the woman shall receive an animal of a middling standard; but the husband has it at his option, instead of this, to pay her the value of such an animal in money.—The compiler of the *Hedayâ* observes that this is to be understood only where a man names the species of the animal in general, without any specific

cific description, (as if he were to say “ I will give you as a dower a “ *horse*,” or “ an *ass*,” without describing whether it is to be an *Arabee* or a *Toorkee*;) but where he does not mention the *species* of the animal, (as if he were to say “ I will give, as a dower, a *quadruped*,”) it is not lawful, and he in that case becomes liable to make good to the woman her *proper* dower.—*Shafei* maintains that a *proper* dower is obligatory in either of the above cases, he holding that nothing is fit to be assigned as dower, in a contract of marriage, but what would be capable of appreciation in a contract of sale; and an animal undescribed is incapable of appreciation, as being unknown, and consequently cannot constitute a dower.—The argument of our doctors is, that a contract of marriage includes an exchange of property for that which is not property, (for the use of the woman’s person, which is the return, cannot be termed such;)—now the law admits that animals may be a debt upon the person, in the course of an exchange, where there is no property in return, as in the case of *Deeyat*, where an hundred camels are rendered obligatory in law, their description being undefined: the dower is therefore to be considered, in this respect, as a *property*, concerning which the man has taken an obligation upon himself *a priori*, in the manner of an acknowledgment; now ignorance, with respect to the actual property, does not invalidate an acknowledgment by which a person takes upon himself, *a priori*, an obligation concerning it; as for example, if a person were to acknowledge that he owed a slave, or any thing else undescribed, his acknowledgment would be good, and the specification would rest with him.

OBJECTION.—If the nomination of a dower be to stand the same as an acknowledgment, it follows that the nomination of an animal on account of dower is approved, although the species remain unknown,—the same as in an acknowledgment respecting property unknown,—which is not the case.

REPLY.—A knowledge of the *species* of the animal is made a condition, in conformity with the rule, that a specified dower shall consist

sist of property, the medium of which may be known, for the sake of both the parties; now this cannot be ascertained, except where the species is known, which comprehends a *best*, a *worst*, and a *medium* of the kind, for if this be unknown, the distinction cannot be made, since no medium can be ascertained amidst an infinite variety of species.—But (as was already observed) the husband has it at his option, in discharging the dower, either to give the woman a medium animal of the species mentioned, or to pay her the value in money, because the medium cannot be ascertained precisely except by appreciation, and consequently the value of the animal is the standard of payment; and, on the other hand, the actual animal is the standard according to nomination.

If a man marry a woman, assigning her a dower of cloth, undescribed, she, in this case, receives her *proper* dower. This is where the term *cloth* alone is mentioned by the man without any addition; and the reason is, that the species of cloth is here unknown and unascertainable, since of that there are a variety of species.—But if he were to name the species of cloth, as if he were to say “I will give, as a dower, a piece of *Hirrooey* *,” this manner of description is approved; and the husband has it in his option either to give a piece of *Hirrooey* of a middling quantity, or to pay the value in cash, for the reasons already stated. In like manner he has it at his option either to give the cloth or to pay the value, where he has been still more particular in his description, mentioning the *length*, *breadth*, and *quality* of it, in a way such as would suffice in a *Sillim* sale.—This is according to the *Zâbir Rawâyet*; and the ground upon which it proceeds is that *cloth* is not of the class of things denominated *Zooâtal-Imfâl*, or things compensable by an equal quantity of the same species. In like manner he shall have the same option where the dower is assigned of goods, the quantity of which is ascertainable by weight

* A particular species of cloth manufactured in *Herat*, a city of *Khorasan*.

or measure, provided he should not have particularly described the *quality*, but only the *species*: but if he should particularly describe the *quality*, he then has no option, and must pay the actual thing mentioned, because, under such description, it becomes a debt upon him, of the specific weighable or measurable articles described.

IF a *Mussulman* marry a woman, agreeing to give her, as a dower, *wine* or a *hog*, the woman has her *proper* dower, because a condition of assenting to receive such articles is invalid; but as a contract of marriage is not rendered null by a nugatory condition being comprehended in it, it holds good, in this case, though the condition be null: contrary to a case of *sale*, which is rendered null by an invalid condition.—The assignment of the dower in either of the articles aforesaid is disapproved, because what is named is not property with *Mussulmans*; and on this principle it is that a *proper* dower becomes due.

Case of a dower consisting of unlawful articles.

IF a man marry a woman, assigning her, as a dower, a cask of vinegar, and the cask should afterwards appear to contain wine, she, in this case, has her *proper* dower, according to *Haneefa*.—The two disciples allege that, in this case, she is to receive vinegar of a medium quality, and the same in quantity as the wine.—And if the man were to name, as a dower, a certain specified slave, (as if he were to say “I assign this slave as a dower,”) and it should afterwards appear that the person so mentioned as a slave was at that time *free*, in this case a *proper* dower is due, according to *Haneefa* and *Mohammed*. *Aboo Yoosaf* says that here the husband owes the estimated value of the free person aforesaid, supposing he were a slave; for he argues that the man has filled the woman with the expectation of a certain property, the delivery of which he afterwards finds impossible; the value therefore is obligatory upon him, or an article similar to that agreed for, if it be of the species of *Zoodat Imfal*, as in a case where a man marries a woman on a dower consisting of a specified slave, and the

Cases of false assignment.

slave

slave dies before delivery.—*Aboo Haneefa*, on the other hand, says that where nomination and pointed reference * are united, regard must be had to the latter, because indication is more clear and express under that form, and hence the case is the same as if the man had engaged to give, as a dower, wine or a hog †. *Mohammed* (coinciding with *Haneefa* with respect to the slave, and dissenting from him with respect to the vinegar, as aforesaid,) says that it is a rule, that if the thing named be of the same species with the thing specified by pointed reference, the contract is connected with the latter; but if the thing named be of a species distinct and different from the thing pointedly specified, it [the contract] is connected with the thing named; because indication is more effectual from *naming* a thing, than it is from pointing that thing out, inasmuch as it is thereby known what that thing is, whereas by pointing it out the *substance* only is known;—on which principle it is that if a man purchase a ring stone, on the condition of its being a *ruby*, and it should prove to be only a *garnet*, the bargain is void, on account of the difference of species; but if a person were to purchase a stone on condition of its being a *ruby*, and it should prove to be an *emerald*, yet the bargain holds good, because these are held by lapidaries to be of the same species:—now, in the present instance, the slave and the free person are of one and the same species; the contract, therefore, is connected with the thing identically specified or pointed out, and on this principle her *proper* dower is due to the woman; but *wine* and *vinegar* being of distinct species, and totally different from each other, (inasmuch as the latter is lawful in use, and the former prohibited,) the contract is there connected

* *Tafmeeat* and *Ishâret*: the former term means simply *naming* a thing, or (as expressed above) *nomination*; by the latter is understood pointing a thing out, such as “*This slave*,” &c.

† That is to say, the condition is altogether void, and a *proper* dower is of course due; for, if the man were to say “I will give as a dower this slave,” and the person so spoken of should appear to be free, it is evident (regard being had to the relative “*this*,” denoting pointed reference) that the condition or agreement is *ipso facto* null, as regarding a *thing* which does not exist.

with

with the thing nominally specified, and consequently the woman is entitled to vinegar equal in quantity to the wine.

IF a man marry a woman, agreeing to give her, as a dower, two slaves specified, as if he were to say “ I assign, as a dower, those “ two slaves;” and it should happen that one of the persons so specified as *slaves* is *free*, in this case, according to *Haneefa*, the woman is not entitled to more than the single slave remaining, provided the value be equal to ten *Dirms*, because the slave is particularly assigned, and where the *assigned* dower is admitted to be incumbent, this prohibits the obligation to a *proper* dower;—as where a man, for instance, marries a woman, assigning her, as a dower, a piece of cloth of the value of five *Dirms*, in which case the woman gets the piece of cloth aforesaid, together with five *Dirms* in money, in such a manner as that the whole shall amount to ten *Dirms*, being the lowest legal dower, beyond which nothing is incumbent. *Aboo Yoosaf* alleges that, in this case, the woman gets the slave, together with the amount of the estimated value of the other person, supposing he were a slave, because here the man has filled her with expectation of *two* slaves, the delivery of one of which afterwards appears to be impossible; wherefore the value of the latter is obligatory upon him. *Mohammed* has said (and there is also one opinion recorded of *Haneefa* to the same effect) that the woman gets the slave, together with a property sufficient to complete her *proper* dower, if that should exceed the value of the slave; because, if both the persons named as slaves by the husband, in specifying the dower, were actually *free*, the whole *proper* dower (according to *Mohammed*) would be due; and consequently, where *one* only is a slave, that slave is due, together with such property as (along with the slave) amounts to a *proper* dower.

IF the *Kdzee* separate a man from his wife, before cohabitation, on account of their marriage being invalid, the woman is not entitled to any part of her dower, because, where the marriage is invalid,

A woman is not entitled to any dower under an invalid marriage dis-

folded before
consumma-
tion;

no obligation with respect to dower is involved in the contract, as that, in such a case, is also null; nor is the dower held to be due on any other ground than the fruition of the connubial enjoyment, which is not found in the present instance.—In the same manner no dower is due after *Khalwat Sabeeh*, or *complete retirement*, because, on account of the invalidity of the marriage, the law does not consider retirement as indicating the commission of the carnal act, and consequently it does not stand as such.—It is however to be observed that in an invalid marriage a separate dower is not due on account of every repetition of the carnal act, because here the right of possession is doubtful, and the case is therefore the same as where a man has repeated carnal connexion with the slave of his son,—or where a man has repeated carnal connexion with his wife, and it should afterwards appear that he had suspended the divorce of that woman upon the circumstance of his marrying her,—in either of which cases one dower only is due, because of a doubt respecting the right of possession: contrary to a case where a man has repeated carnal connexion with the slave of his father, his mother, or his wife, and pleads his conception of the same being lawful; for in this case a dower is incumbent upon him for every repetition of the act, because here no doubt exists, as he appears, on every repetition, to have had carnal connexion with a slave who is the absolute property of another:—and contrary, also, to a case where a man has repeated carnal connexion with a female slave held in partnership between himself and another, for in this case an *half fine* is incumbent upon him for every repetition (according to the determination in the *Burbânal Aima* of *Abdal-azeez-Bin Amroo*,) because he has every time committed the carnal act in the share of his partner.

but in case
of consum-
mation, she
is entitled to
her proper

If a man engage with a woman in an invalid marriage, and have carnal connexion with her, she is in this case entitled to her *proper* dower: but she is not entitled to more than the *speci-*
fied

fied dower*, according to our doctors.—This is contrary to the opinion of *Ziffer*, who conceives an analogy between this and an invalid sale; that is to say, in an invalid sale, if the stipulated price of the thing sold be short of its actual value, the latter is due to whatever amount; and so also in the present case.—The argument of our doctors, in this case, is that the thing which the husband has received (namely, the possession of the woman's person) is not *property*, and therefore is not appreciable in any other way than by the assignment of a dower; now if the dower assigned should exceed the *proper* dower, the excess is not incumbent, because of the invalidity of the assignment, for that is a part of the contract, which being invalid, the assignment is so likewise; and, on the other hand, if the dower assigned be *short* of the *proper* dower, the difference is not incumbent, because, with respect to that, assignment has not been made: contrary to an *invalid sale*, because there the thing sold is appreciable, and consequently the amount of the return will be adjusted by its value.

dower, not exceeding what is specified in the contract;

THE observance of an *Edit*, after separation, is incumbent upon a woman with whom a man has had carnal connexion in an invalid marriage. And here the *Edit* is to commence as from the date of separation, and not from that of the last carnal connexion.

and she must observe an *Edit* after separation.

THE descent of a child born of a woman enjoyed in an illegal marriage is established [in the reputed father,] because in this regard is had to the child's preservation, since if the descent were not to be established, the child might perish for want of care.—*Mohammed* holds (and decrees are passed agreeable to this doctrine) that, in the establishment of genealogy under an invalid marriage, the time † is calculated

A child born in an illegal marriage is of established descent.

* That is to say, if her *proper* dower should exceed in value the dower specified in the contract, yet the woman is entitled to the *specified* dower only, and not to her *proper* dower.

† The probable term of pregnancy, by which the child's descent is to be judged of and ascertained. (For a further elucidation of this point see Book of Divorce, Chap. XIII.)

from the *first carnal connexion*, not from the *date of the marriage*, because one which is *invalid* does not give a claim to the carnal act, so as to stand as such, whereas the reverse is the case in a *valid* marriage, as that establishes such claim: and hence, in the establishment of genealogy, the time is calculated from the date of the marriage.

Rate of the
Mibr Misl, or
proper dower.

THE *Mibr Misl* (or *proper dower*) of any woman is to be regulated, in its amount or value, by that of the dower of her paternal relations, such as her paternal *sisters* or *aunts*, or the daughters of her paternal *uncles*, and so forth, according to a precept of *Ibn Mussáood*, “*To the woman belongs such a dower as is usually assigned to her female paternal relatives:*”—moreover, men are accounted of the class of their *paternal* tribe, and the value of a thing cannot be estimated but by attending to the value set upon its *class*.

A WOMAN'S *proper dower* is not to be estimated by the dower of her mother or her maternal aunt, where they are not descended of her father's family, on account of the precept of *Ibn Massáood* already recorded: yet if her mother should be descended of her father's family, (being, for instance, the daughter of his *paternal uncle*,) in this case a judgment may be formed from *her* dower, as being descended from the family of the *father*.

IN regulating the *proper dower* of a woman, attention must be paid to her equality with the women from whose dowers the rule is to be taken, in point of age, beauty, fortune, understanding, and virtue, because it varies according to any difference in all these circumstances; and, in like manner, it differs according to place of residence, or time, (that is to say, times of trouble and confusion, as opposed to times of tranquillity;)—and the learned in the law have observed that equality is also to be regarded in point of virginity, because

because the dower is different according as the woman may be a virgin or otherwise.

IF the *Walee* [guardian] of a woman become surety for her dower, it is approved, because he is competent to such responsibility, (that is, to take such obligation upon himself,) and he is surety in a thing which is a legal subject of bail, (namely, the dower,) since that is a *debt*, in which bail is approved: and the woman is afterwards at liberty to require her dower either of her *husband* or of her *guardian*, as in all other cases of bail: and if the guardian pay the dower, he shall take the same from the woman's husband, where he has become surety at his desire, as is the invariable rule in bail. The bail is in like manner approved, if the wife be an *infant*: contrary to where a father sells the property of his infant child, and becomes bail for the amount, which is not lawful, because a guardian is, with respect to marriage, a *negociator* merely; but, in *sale*, he is the executor of the contract, (whence it is that its obligations rest upon him, and its rights appertain to him;) and the father's discharge is also approved, if he clear the purchaser of the whole price of the infant's property; and he is moreover at liberty to take possession of the price after the infant shall have attained maturity; wherefore, if his bail were to be approved, it would admit the principle of a man becoming surety in his own behalf, which is absurd.

A woman's
guardian may
become surety
for her dower.

OBJECTION.—A father is at liberty to take possession of the dower of his infant daughter, in the same manner as of the price of his infant child's property; wherefore if the bail of the father with respect to the dower be approved, it follows that he is bail in his own behalf.

REPLY.—The authority vested in a father to take possession of the dower is because of his parental relation, and not on account of his being a party in the contract, (for which reason it is that he is not at liberty to take possession of the dower after the maturity of his

his child,) so that he does not, in this case, appear to be bail in his own behalf.

A woman may resist consummation until she be paid the prompt proportion of her dower,

A woman may refuse to admit her husband to a carnal connexion until she receive her dower of him, so as that her right may be maintained to the return, in the same manner as that of her husband to the object for which the return is given, as in *sale*.

A woman is also at liberty to resist her husband carrying her upon a journey until she shall have received her dower of him, for the same reason.

ON the other hand, the husband has no power to restrain his wife from going on a journey, or from going abroad, or visiting her friends, until such time as he shall have discharged the whole of the *Mibr Modjil*, or *prompt* dower, because a husband's right to confine his wife at home is solely for the sake of securing to himself the enjoyment of her person, and his right to such enjoyment does not exist until after the payment of the return for it.

unless the whole dower be *deferable*.

WHAT is here advanced proceeds upon a supposition of the whole dower, or a certain portion of it, being *Modjil*, or *prompt*; but if the whole be *Mowjil*, or *deferred**, the woman is not at liberty to refuse the embraces of her husband, as she has dropped her right by agreeing to make her dower *Mowjil*,—the same as in a case of *sale*, where, if the price of the article sold be made *deferable*, the seller is not at liberty to detain the article sold on account of the price.—*Abou Roosaf* controverts the doctrine which is here advanced, and maintains that, in this case also, the wife is at liberty to refuse to admit her husband to carnal connexion, as long as he omits to make payment of the dower.

and she may also resist a

—It is further to be observed, that even if the husband should have

* That is to say, if the stipulation fixes the payment of the dower at some future period, as *a year*, or so forth.

committed

committed the carnal act, or should have been in complete retirement with the wife, yet the rule is the same; that is to say, she is still at liberty to refuse to admit him to carnal connexion, or to resist his carrying her upon a journey, until such time as she shall have received the whole of her prompt dower from him.—This is the doctrine of *Haneefa*.—The two disciples, on the contrary, allege that the woman, in this case, has no such liberty of refusal or resistance.—It is to be remarked, however, that this difference of opinion subsists only where the original carnal act, or complete retirement, has taken place *with the woman's consent*; but if she have been enjoyed by force, or if she be an infant or an idiot, her right of refusal or resistance, as above, does not cease, according to the united opinion of all our doctors.—It is proper to observe, that where the woman refuses to admit the husband to a repetition of the carnal act, as above stated, yet she has, nevertheless, (according to *Haneefa*,) a claim to her *subsistence*, as her refusal does not, in this case, proceed from any *stubbornness* or *disobedience*, since it is not exerted in *resistance* to a right, but rather in *maintenance* of one.—The two disciples hold that she is not entitled to any subsistence;—and their argument on this occasion is, that the sole object of the contract has been duly delivered to the husband, either by the single carnal act, or by the single complete retirement, as aforesaid; on which account it is that her right to her whole dower is confirmed and established, and consequently no right of further detention of her person remains with her; as in a case of sale, where the seller having delivered the article sold to the purchaser, before receiving the price, has no farther right over it.—*Haneefa*, on the other hand, reasons that the woman in resisting refuses and withholds a thing which she has opposed to a *return*, and over which she has, of course, a right of detention, until such return shall have been duly made to her: and with respect to what the two disciples allege, that “her right to her whole dower is confirmed “and established by the single carnal act, and so forth,”—it may be replied, that the whole becomes confirmed to her by a single com-
mission

repetition of
the con-
nexion, after
consumma-
tion, in the
like circum-
stances;

but she is,
notwithstand-
ing, entitled
to her sub-
sistence.

mission of the carnal act, or a single instance of complete retirement, necessarily, because every thing beyond that is then unknown, and consequently cannot obstruct the operation of what is known; but the right of resistance still remains, because the dower is opposed to the *whole*, the same as to the *single instance*, of enjoyment.

The husband obtains full authority over his wife upon payment of her dower.

WHEN the husband has duly paid to his wife the whole of her dower, he is at liberty to carry her wherever he pleases, because the word of GOD says, “YE SHALL CAUSE THEM TO RESIDE IN YOUR OWN HABITATIONS.”—Some have alleged that the husband is not at liberty to carry his wife to another city different from her own, although he should have paid her the whole dower, because journeying and travelling may be injurious to her; but he is at liberty to carry her to the villages in the vicinity of her city, as this does not amount to *travelling*.

Cases of dispute between the parties concerning the amount of dower;

IF a man marry a woman, and they afterwards dispute concerning the rate of her dower, the declaration of the wife is to be credited to the amount of her *proper* dower, and that of the husband, with respect to any *excess*.—This proceeds upon a supposition of his having had carnal connexion with her:—but if he should have divorced her *before* consummation, his declaration alone is to be credited with respect to the *half* dower.—This is the doctrine of *Haneefa* and *Mohammed*. *Abou Yoosaf* alleges that the declaration of the husband is to be credited, whether before divorce or after, unless where it goes to establish something trifling,—that is to say, something so small as is known to be short of what such a woman has a right to expect in marriage according to general usage; and this is approved. The argument of *Abou Yoosaf* is that, in the case in question, the woman is plaintiff suing for an excess, and the husband defendant; and the declaration of a defendant, when made upon oath, is to be credited; wherefore that of the husband, in the present instance, must be so, unless he testify to something so small as that apparent circumstances argue

argue against him: and the ground upon which this proceeds, is that the appreciation of the woman's person is a matter of necessity; and, therefore, so long as it is possible that any thing can be decreed from the *stipulated* dower, the *proper* dower is not regarded.—The argument of *Haneefa* and *Mohammed* in this case is that, in all claims, credit must be given to the declaration of that person in whose favour apparent circumstances bear testimony, and apparent circumstances *do* bear testimony with one who attests the *proper* dower, as that is the standard object in marriage;—similar to a case where a dispute arises between a dyer and the owner of a piece of cloth, concerning the charge for dying, in which case the declaration of that person will be credited in whose behalf the value of the *dye* or *colour* bears testimony*. Concerning what is here advanced, that “if the husband should divorce his wife before consummation, his declaration alone is to be credited with respect to the half dower;” it is to be observed that this (which is recorded by *Mohammed* in the *Jama Sagbeer* and *Mabsoot*) apparently contradicts what he has advanced in the *Jama Kabeer*, to wit, that “the woman must, in this case, be decreed a proportionable *Matât*, or *present*,”—(which is conformable to the inference of *Haneefa* and *Mohammed*, who hold that, as a present is due, on account of a contract of marriage, *after* divorce, the same as a *proper* dower, *before* divorce, the one must be decreed her in the former case, as well as the other in the latter;)—but this apparent contradiction between the above authorities may be reconciled, by adverting to the different manner in which the case is put in them respectively; thus, in the *Mabsoot*, the case supposes *one* thousand *Dirms* and *two* thousand,—that is to say, the husband declares that the dower is only *one* thousand *Dirms*, and the wife claims *two* thousand; now the value of a customary present does not equal the *half* of those sums, and of course, to decree a present here would be no advantage to the plaintiff:—in the *Jama Kabeer*, on the other hand, the case supposes *ten* *Dirms*, and *one hundred* *Dirms*,—that is to say, the husband avers the dower to be

* Because, as different colours bear a different price, the value of the *colour* used is certainly the only standard by which the amount of the charge for dying can be judged of.

only *ten Dirms*, and the wife claims *one hundred*; and her *proper** present may be estimated, suppose at twenty *Dirms*; here therefore a proper present may with propriety be decreed to her: and what occurs upon this subject in the *Jama Sagheer* being destitute of any mention of the amount of the dower, that rests upon what is said in the *Mabsoot*.—As a more full exposition of the doctrine of *Haneefa* and *Mohammed*, in a case where a dispute arises between the husband and wife concerning the amount of the dower on the continuance of the marriage, let us suppose that the husband declares *one thousand Dirms*, for instance, and the wife claims *two thousand*; in which case, if the *proper* dower of the woman do not exceed *one thousand*, the declaration of the husband is to be credited; but if it be *two thousand*, or upward, that of the wife; and whoever of the two produces evidence in support of his or her declaration, the same is to be credited, under either of the above circumstances; and if they both produce evidence under the first of the above circumstances, (that is, the woman's *proper* dower not exceeding *one thousand Dirms*,) the evidence on the part of the wife is to be credited, because by such evidence her right to the excess is established;—but if, under the *second*, (that is, the woman's *proper* dower being *two thousand* or upwards,) the evidence on the part of the husband is to be credited, because that goes to prove that the wife has made an abatement in her dower: but if the *proper* dower be *one thousand five hundred Dirms*, both parties must be required to make oath, after which *one thousand five hundred* are to be decreed to the woman. This is according to the *Takbreej* of *Râzi*. *Koorokbee* says that the oath must be tendered to both parties in all the three circumstances, after which the *proper* dower must be decreed.—All this applies to a case where the husband and wife dispute with respect to the amount of the dower itself, and not with respect to its specification: but if their dispute respect the latter, one of the parties asserting that a dower had been named, and the other denying, in this case the *proper* dower must be decreed, according to all

* Arab. *Misl*: that is, proportionable to her rank and circumstances, in the same manner as the *proper* dower.

the doctors, that being the original dower independant of any specification.

IF, after the death of the husband or wife, a dispute should arise between the survivor and the heirs of the deceased, concerning the amount of the dower, the rule in this case is the same as when the dispute arises between the parties during life, because a claim to the woman's *proper* dower does not cease in consequence of the demise of either.

or between
one of the
parties, and
the heirs of
the other;

AND if both husband and wife were to die, and a dispute to arise between their heirs with respect to the amount of the dower, in this case the declaration of the husband's heirs shall be credited, although they should declare a sum less than the usual and customary dower of such a woman as the wife deceased.—This is according to *Haneefa*. *Mohammed* holds that the rule is the same here as where the dispute arises between the parties during life.—And if the heirs dispute with respect to the *specification* of the dower, one party insisting that a dower had been named, and the other denying, the declaration of the latter is to be credited, according to *Haneefa*. In short, with *Haneefa*, the woman's *proper* dower is not at all regarded after the decease of both parties, as shall be hereafter demonstrated. The two disciples, on the other hand, maintain that the *proper* dower should in that case be decreed.

or between
the heirs of
both parties.

IN case of the death of both husband and wife, it belongs to the heirs of the latter to take the dower out of the estate of the husband, where it has been specifically named; but if it should not have been specified, they cannot claim any thing whatever, according to *Haneefa*. The two disciples maintain that the woman's heirs are entitled to her dower in either case,—that is to say, to the specified dower, in the former case, or to the woman's *proper* dower, in the latter;—in the *former*, because the specified dower was a debt upon the husband, con-

The heirs of
a deceased
wife may take
the amount of
the specified
dower out of
the deceased
husband's
property.

firmed by the circumstance of his decease, and consequently must be paid out of his estate, unless it should be known that the wife had died first, in which case the husband's portion of inheritance would drop from the dower [that is, must be deducted from it,] on account that he also is an heir;—and, in the *latter*, because the woman's *proper* dower had become a debt upon the husband, the same as a *specified* dower, and therefore does not drop in consequence of his death, any more than where only *one* of the parties dies.—*Haneefa* argues that, in this case, a supposition of the death of both husband and wife affords a conclusion that their peers and contemporaries are all already cut off by death, and no longer remain, because it is most probable that they would not both die until after a length of time; and after the lapse of such a period, their peers and contemporaries no longer remaining, from whom can the *Cawzee* judge of or decide what the value of the woman's *proper* dower ought to be?—*Haneefa*, however, holds also that where the husband and wife both happen to die before the lapse of any length of time, so as that their peers and contemporaries are still remaining, her heirs are entitled to her *proper* dower.

Case of a dispute concerning articles sent by a husband to his wife.

IF a husband were to send any thing to his wife, and she were to denominate it a *present*, while he asserts that he has given it in part payment of her *dower*, in this case the declaration of the husband must be credited, because he is the giver, and consequently must be supposed to know his own intentions best;—moreover, it is evidently the business of the husband to liquidate the obligation which lies against him, before he proceeds to perform gratuitous acts; his declaration, therefore, must be credited, except where the thing sent consists of victuals ready dressed for eating, (such as *roasted*, or *boiled*, or *stewed*, and so forth,) in which case the assertion of the woman must be credited, because it is usual and customary for husbands to send such articles as presents to their wives, not counting it in the dower; but in respect to *wheat* or *barley*, the declaration of the husband

should

should be credited for the reason abovementioned.—Some have observed that articles, the supply of which is generally held incumbent upon the husband, such as *shifts*, and *robes*, and *veils*, are not to be counted in the dower, apparent circumstances arguing against this.

SECTION.

IF a Christian man marry a Christian woman without stipulating any dower, or making it consist of carrion *, such as may be deemed lawful by those of their profession, and have carnal connexion with her, or divorce her before consummation, or die and leave her, the woman is not entitled to any dower whatever, although both parties should have embraced the faith within the interim.—And the law is the same where the parties are aliens married on like terms in a foreign country. The opinion of the two disciples concerning aliens is the same as that of *Aboo Haneefa*: but with respect to *Christians*, being *Zimmes*, (that is, subjects of the *Mussulman* government,) they hold that the woman is entitled to her *proper* dower, where the husband either consummates the marriage by committing the carnal act, or dies; and that she is entitled to a present when he divorces her before consummation.—*Ziffer* alleges that the alien woman is entitled to her *proper* dower in either case, (that is, in the event either of the husband's death, or of divorce,) because the law does not hold it allowable to seek or desire marriage but in return for property, and this rule equally affects *Infidels* and *Mussulmans*, as marriage forms a part

Of the dower of infidel subjects, and of aliens, where none has been stipulated, or where it consists of carrion.

* Meaning the flesh or carcass of any animal which dies a natural death.—The original word signifies the flesh of any fowl or quadruped (not being *Game*) which has not been lawfully slain.

of the temporal law, the obligations of which extend to all alike. To this the two disciples reply, that aliens do not take upon themselves any obligation to the observance of the laws of *Islâm*, neither are they capable of so doing, on the account of a difference of country: contrary to the case of *Zimmees*, who are subject to the *Mussulman* law in all temporal concerns, or acts to which the temporal law has reference, (such as *whoredom*, *usury*, and so forth,) since they are fully capable of taking upon themselves an obligation to the observance of those laws, as being native subjects of the *Mussulman* country. *Haneefa* reasons upon this, that *Zimmees* do not subject themselves to any of the laws of *Islâm*, either with respect to things which are merely of a religious nature, (such as fasting and prayer,) or with respect to such temporal acts as, though contrary to the *Mussulman* law, they may hold to be legal, (such as the sale of wine, or of swine's flesh,) because we are commanded to leave them at liberty, in all things which may be deemed by them to be proper, according to the precepts of their own faith; wherefore, with respect to all such acts, *Zimmees* are the same as aliens; but from these is to be excepted whoredom, that being held universally, and by all sects, to be a criminal act; and as to *usury*, no such thing can have legal existence, it being excepted from all the obligations to which the person can be subject, because of a saying of the prophet, "*Observe that between us, and*" "*whosoever takes usury, no engagements exist.*"—The compiler of the *Hedâya* remarks that what *Mohammed* has advanced in the *ŷama Sagheer*, "*If a Christian man marry a Christian woman without any*" "*dower,*"—and so forth,—may be understood in two ways,—one, the absolute exception of a dower, (that is, especially stipulating that *there shall be none*;) and the other, merely the omitting to mention it in the contract. Some have said, concerning this case, that where the dower is either made to consist of unlawful articles, or is not mentioned in the contract, there are two traditions; according to one, the woman is entitled to her *proper* dower, (as maintained by the two disciples,) and according to the other, nothing whatever is due:
and

and it is from this variance in the traditions that the difference of opinion arises between *Haneefa* and *Mohammed*.

IF a *Zimnee* marry a *Zimneea*, making the dower to consist of wine or pork, and *one* or *both* should afterwards embrace to the faith, yet the woman is nevertheless entitled to the unlawful article settled upon her, although the conversion take place previous to seizure, provided the unlawful article had been identically specified; but if this be not the case, the woman, in the instance of wine, is to receive the estimated value of such wine, or in that of pork, her *proper* dower.—This is according to *Haneefa*. *Abou Yoosaf* alleges that the woman is entitled to her *proper* dower in either instance. *Mohammed*, on the contrary, maintains that she is in either instance entitled to the estimated value of the unlawful article specified, whatever it be.—The reasoning upon which the opinion of the two disciples proceeds in this case is, that by seizure, or possession, the right in the thing possessed becomes fully established and confirmed; seizure, therefore, is similar to a contract of marriage, since, like that, it produces a right which had not before existed; and consequently the seizure of *wine* or *pork* by a *Muslima*, as a dower, is illegal, the same as a contract itself including a specification of such unlawful articles, as a dower; and this, whether those articles may have been identically specified, or only generally mentioned.—*Abou Yoosaf* further remarks that as, where the time of seizure is connected with the time of the execution of the contract, if both parties were then to embrace the faith, her *proper* dower would become due to the woman, so in the present instance likewise:—with *Mohammed*, on the other hand, the mention of the unlawful article, as a dower, is approved, as being held, by the sect of the parties, to be property; but yet the delivery is forbidden, on account of the parties having embraced the faith; wherefore the value becomes obligatory upon the husband, the same as where a man makes dower of a slave who dies before the delivery.—The argument of *Haneefa*, on this subject, is that a dower identically specified becomes the property

Of the dower of infidel subjects, where it consists of *wine* or *pork*.

property of the woman on the instant of the contract of marriage being executed, for which reason it is that a woman is empowered to make what use of her dower she may think expedient, by giving it away, or transferring her property in it, either *for* or *without* a return; and the only difference that possession makes is, that the husband is thereby exonerated from responsibility with respect to it, this being simply a transition of it from the possession of the husband to that of the wife, which does not become prohibited here by the *Islám* of the parties, any more than in the case of a claim of restitution of wine which had been forcibly seized;—that is to say, if a person were to make a forcible seizure of wine from a *Zimmee*, and this *Zimmee* should afterwards become a *Mussulman*, he is nevertheless still at liberty to claim restitution of the wine thus forcibly seized; and so likewise in the present case: (contrary to a case where a *Zimmee* purchases wine or a *hog*, and afterwards becomes a *Mussulman* before he has taken possession of his purchase; for in this case it is unlawful for him to take possession, and the bargain becomes void, because, in *sale*, a right of transaction with respect to the property sold does not take place until after seizure is made of it by the purchaser, which becomes forbidden by his subsequent *Islám*:)—but where the unlawful article is not identically specified, nothing but actual possession can establish a property in it, and this becoming prohibited by the subsequent *Islám* of the party, and being thereby precluded, the price or value of the pork would not be due to the woman, because the receipt of that is the same as of the property itself,—hog's flesh being of the class of things denominated *Zooátal-Keem*, whereas wine is not of this nature, being of the class of *Zooátal-Imfál*, for which reason, if the husband were to offer the value before *Islám*, the wife would be compelled to accept of that of the *pork*, but not of that of the *wine*.—It is to be remarked that if the husband, in the present instance, were to divorce his wife before consummation, the same difference of opinion exists among our doctors; those who (as above) determine for a *proper dower*, decreeing her a present; and those who make the *value* of the article obligatory upon the husband, decreeing her an half of such value.

CHAP. IV.

Of the *Marriage of Slaves.*

THE marriage of a male or a female slave is not lawful without the master's consent. *Malik* has said that the marriage of a male slave is valid independant of the consent of his master, because he is competent to pronounce divorce, and is therefore equal to the contracting of marriage.—The arguments of our doctors on this subject are twofold;—FIRST, a precept of the prophet says “*Whatever slave marries without his owner's consent is an adulterer* ;”—SECONDLY, marriage, with respect either to male or female slaves, is a blemish *, on which account they are not at liberty to enter into such a contract without the approbation of their owners.

Slaves cannot marry without the consent of their proprietor;

NEITHER is it lawful for a *Mokâtib* to enter into a contract of marriage without his owner's consent; because a slave of this description, although he be, by virtue of his contract of *Kitâbat*, rendered free with respect to acquisition, of necessity, yet remains, with respect to matrimony, subject to the laws of bondage. And, for the same reason, it is not lawful for a *Mokâtib* to contract his own male slave in marriage without the consent of his owner; but he may lawfully contract his *female* slave, as hence arises an acquisition, in her dower.—In like manner, it is not lawful for a *Mokâtiba* to marry without her owner's consent; but she may lawfully contract her female slave in marriage, as hence arises an acquisition to her as above. Neither is it lawful for a *Modabbir* or *Am-Walid* to marry

nor *Mokâtibs*,

(although such may contract their own female slaves in marriage,) nor *Mokâtibas*, (although they have

* As tending to depreciate their value.

the same
privilege.)

without their owner's consent, because his authority with respect to them still exists.

A slave may
be sold for
the discharge
of his wife's
dower:

IF a slave marry with his master's consent, the dower [to the woman whom he marries] is a debt upon his person, for the payment of which he may be sold, because the debt has become obligatory upon the slave on account of the existence of its cause, (namely, *marriage, proceeding from a competent person,*) and the obligation of the debt extends to the master also, he having consented thereto, and accordingly devolves upon him, in order that the creditor may be protected from injury; as in the case of debts contracted by a slave in mercantile dealing.

and a *Modabbir*
or *Mokâtib*
are to dis-
charge it by
labour.

A *Modabbir* or *Mokâtib* (in case of marriage,) must discharge the dower by labour, as not being liable to be sold, because the property in them is not capable of being transferred from one to another; this debt of the dower, therefore, is to be discharged by their acquisitions, so that the wife may not be subjected to loss; but their persons are not liable to be attached for payment.

How far a
master's de-
siring his
slave to di-
vorce his
wife, is an
argument of
his assent to
the slaves
marriage.

IF a slave marry without his owner's consent, and the latter afterwards should say to him "divorce" [*your wife,*] or "put her away," his [the owner's] assent to the marriage is not implied, because such a mode of address bears the construction of *obstructing* or *resisting* the *execution* of the contract, as the terms *divorce* and *separation* apply to *that*, as well as to the dissolution of the contract of marriage already executed; it is therefore to be thus construed, either because this is suitable to the state of a disobedient and refractory slave, or because the *prevention* of a marriage is an act of less magnitude than the *assenting* to it. But if the owner were to say to his slave "repudiate her by a divorce reversible," this implies his assent to the marriage, because a reversible divorce is not supposed but in a case of marriage,

marriage, [already executed,] wherefore assent to the marriage is hereby signified.

IF a person desire his slave to marry such a femal slave, and he accordingly wed her by an invalid marriage *, and have carnal connexion with her, *Haneefa* holds that the slave shall be sold for the discharge of her dower. The two disciples, on the contrary, maintain that the dower shall be exacted of him (the slave) upon his becoming free.—The foundation of this difference of opinion is that, with *Haneefa*, assent applies equally to a legal and to an invalid marriage, and consequently the debt [of the dower] is upon the owner; but with the two disciples, assent applies to a *valid* and *regular* marriage only, wherefore the debt is not upon the owner, (whence it is that it may be required of the slave on his becoming free at any subsequent period,) for they argue that the intent of marriage is to guard against incontinence, and that end is obtained by *regular*, but not by *invalid* marriages, wherefore if a person were to make a vow that he will not marry, his vow applies solely to *regular* marriage: contrary to a case of *sale*; that is to say, if a person were to empower another in sale, such power extends both to *regular* and to *invalid* sale, a variety of privileges being therein involved, such as the right of emancipation, and so forth: *Aboo Haneefa*, on the other hand, argues that the word “*marry*” [in the owner’s desire expressed to his slave] is general, and is therefore to be considered as having a general application, the same as *sale*; and there are a variety of points involved in an irregular marriage, as well as in *sale*, such as genealogy [of children born in such marriage,] and the obligations to the payment of dower, and to the observance of *Edit*; and with respect to the instance of a *vow*, as produced by the two disciples, it is not admitted as applicable by *Haneefa*.

Obligation of the dower in a case of *invalid* marriage, contracted by a slave at the desire of his owner.

* That is, under such circumstances of affinity &c. as invalidates the marriage.

Case of an
indebted
Mazoon, con-
tracted in
marriage by
his owner.

IF a man contract his *Mazoon*, or *privileged slave*, who is a debtor, to any woman in marriage, it is lawful; and the wife [in virtue of her right to her dower] becomes a joint creditor with the others; that is to say, the slave is to be sold for the discharge of all his debts, and the price arising from the sale is to be divided between his wife and the other creditors, in proportion to their respective claims.—The compiler of the *Hedaya* observes that this rule holds only where the marriage has been effected upon a *Mibr Misl*, or less; but if the dower exceed the *Misl* proportion, the other creditors are, in that case, on an equality with the wife, so far as the amount of her *Mibr Misl*, or *proper dower*, and the payment of the excess must be postponed till after the discharge of the debt to the creditors; the ground of which is, that the owner's authority over his slave, with respect to matrimony, is founded on his having the property of his person, (as shall be hereafter explained,) and that right of property still remaining, the marriage of the slave is completely *legal* and *valid*.

OBJECTION.—In consequence of the marriage, the right of the creditors is rendered null, both *by design*, and *in effect*; wherefore it would be requisite that, in discharging the debts of the *Mazoon*, those due to the first creditors ought to be first paid; whereas it is otherwise in this case, for they are all put on an equality.

REPLY.—The right of the creditors is not designedly rendered null by the marriage; but the marriage being held valid, the debt of dower is due in consequence of the existence of its cause; and there is nothing to invalidate its existence; the dower, therefore, is the same as a debt of damage;—that is to say, where a *Mazoon* slave, being already in debt, destroys or wastes the property of a stranger, the latter comes in as a joint creditor; and the slave is as a sick debtor;—that is to say, if a sick person, being in debt, marry a woman, she comes in as a joint creditor with the others, to the amount of her *proper dower*, and so in this case likewise.

IF a master contract his female slave in marriage to another man, he is not under any obligation to send her to the house of her husband, she still remaining attached in service to her master; and the husband shall be desired to visit his wife at opportune seasons, at her master's house; because his right to her service still remains in virtue of his property in her, and if he were under any obligation to send her to the house of her husband, his right would be rendered null.— And if the master should give permission to his female slave to dwell in the house of her husband, her subsistence and lodging are incumbent upon the husband; but if he should not permit this, nothing whatever is incumbent, because subsistence is the recompense for the matrimonial restraint, and if she live in the house of her husband she is under this restraint, but not otherwise.—And if the master thus permit her to dwell with her husband, still he is at liberty, notwithstanding, to call for and require her legal service at any subsequent period; because his right of usufruct still continues, in virtue of his property in her; and this right is not relinquished by such permission any more than by her marriage.

A master may withhold permission from his female slave to dwell in the house of her husband;

and if he so permit, her husband must support her; but not otherwise.

THE compiler of the *Hedaya* remarks that *Imâm Mobammed* has said, “*A master contracting his male or female slave in marriage is lawful,*”—without making any mention of the consent of the slave to such marriage, which shews that this consent is not a condition; and such is the opinion of our doctors, who hold that a master is empowered to contract his slaves in marriage by compulsion,—that is to say, that the marriage of such, where it is contracted by the master, holds good independant of their consent. According to *Shafeï*, a master is not empowered to contract his *male* slave in marriage by compulsion; and there is also an opinion of *Haneefa* recorded to this effect: this doctrine proceeds upon the principle that marriage is a natural privilege of man, and a slave is a possession of his owner by the laws of *property*, but not by the laws of *nature*; wherefore the master is not endowed with any absolute authority with respect to his marriage: contrary

contrary to the case of a *female* slave, whose owner, as being entitled to the carnal use of her person, is at liberty to transfer the same to any other.—The argument of our doctors on this subject is that a master, in causing his slave to marry, acts with a view to the preservation of his property, because, by marrying, the slave is withheld from the commission of whoredom, which is a cause of destruction or damage*; the master, therefore, is fully empowered with respect to the marriage of his male slaves, the same as of his females; but he is not thus empowered with respect to his *Mokâtib*, or *Mokâtiba*, because these are, as to privileges, the same as free persons, and their consent is therefore a condition; for if it were otherwise, their privileges and powers of action would be totally annulled.

An owner
slaying his
female slave
before con-
summation
has no claim
to her dower,

IF a man marry his female slave to another person, and afterwards put her to death, before her husband has had carnal connexion with her, no part of the dower whatever is, in this case, due from the husband, according to *Haneefa*. The two disciples hold that, in this case, the dower is due from the husband, in the same manner as it would be if the female slave had died a natural death; and the foundation of their opinion is that a person who is slain dies by his own fate, death implying merely the termination of life, and life being terminated by the act of killing; the case, therefore, is here the same as if the female slave had been slain by a stranger,—that is to say, if the female slave had been slain by a stranger, her dower would remain due from the husband, and so also in the present case.—The argument of *Haneefa* is that the owner of the slave, who (as being her *Mawla*) claims the consideration, has by his act prevented the delivery of the return, (to wit, the person of the woman,) and consequently his right to the consideration is extinguished, in the same manner as when a free woman apostatizes;—that is to say, if a free woman apostatize from the faith before she has admitted her husband to the carnal embrace, no dower whatever is due to her, she [by her act of apostasy]

* On account of the punishment which attends it.

having prevented the delivery of the return; and so likewise in the present instance. With respect to what is advanced by the two disciples, that “a person who is slain dies by his own fate,” it may be answered, that although this be admitted, yet it holds with respect to a future state only, and not with respect to this world, murder, according to worldly institutes, being in the eye of the law considered as an act of destruction, inducing retaliation, fine, and so forth; and it is therefore to be regarded as an act of destruction with respect to the dower, that also being a temporal institution.

IF a free woman kill herself before she has admitted her husband to carnal connexion, her dower is nevertheless due from him:—contrary to the opinion of *Ziffer*, who conceives an analogy between this case and that of a woman apostatizing before carnal connexion, or of a master slaying his female slave; for he argues that no dower whatever is here due from the husband, as the wife, to whom the consideration belongs, has by her act of suicide prevented the delivery of the return.—The arguments of our doctors are that, in worldly institutes, no regard is paid to the offence committed by a man upon his own person, wherefore suicide is to be held as dying a natural death: contrary to the case of a man killing his female slave, that being an act to which worldly institutes have regard, and, as such, subjecting the perpetrator of the murder to the performance of acts of expiation.

The dower of a free woman is due although she kill herself before consummation.

IF a man marry the female slave of another, and be desirous of committing the act of *Azil* with her, (i. e. *emissio Seminis in Ano, vel inter Mamillas*,) this shall depend upon her master's permission, according to *Haneefa*; and such also is the *Zâhir Rawâyet*.—According to the two disciples, the permission to this act rests with the slave, because [as being the man's wife] carnal connexion is her right, but by *Azil* that carnal connexion which is her right is frustrated; her consent, therefore, is a requisite condition to the legality of the act, the same as that of a free woman: contrary to the case of a female

female slave, who is the property of the person having such connexion with her *, because carnal connexion is not her right, (whence it is that she is not entitled to claim the carnal act of her master or owner,) and consequently her consent is not a condition.—The principle upon which the *Zâbir Rawâyet* proceeds in this case is, that the act of *Azil* defeats the intention of marriage, which is the production of children, and this is a right of the master †; whence it is that *his* consent is a condition, and not that of the *slave*.—And herein appears a distinction between the state of a free woman and that of a slave [in marriage.]

A female slave, upon obtaining her freedom, has a right to annul the marriage contract, where it was executed with her owner's consent;

IF a female slave marry with her owner's consent ‡, and afterwards become free, she is then at liberty either to break off the marriage, or to continue it, whether her husband be a slave, or a freeman, because, upon *Barreera* (who was a *Mokâtiba* of *Aysba*) becoming free, the prophet said to her “*You are now mistress of your own person, and therefore at your own disposal,*”—which tradition evinces that she is at liberty as above, whether her husband be a slave or a freeman; since the cause of her right of option, as there mentioned, (that is, her being mistress of her own person,) exists equally in either case.—*Shafëi* maintains that she has no such right of option, where her husband is a freeman: the tradition above quoted, however, is in proof against him: moreover, the power of the husband with respect to his wife is greater after her emancipation than it was before, because before she was free he had power to pronounce only a *double* sentence of divorce, whereas afterwards he is authorized to pronounce *three* divorces, on which account she is justly empowered to set aside the contract of marriage, so as that her husband may not obtain any additional authority with respect to her in consequence of

* As where a master has connexion with his female slave in virtue of *propriety*.

† Because he has a property in the children born of his slave.

‡ That is, at *his instigation*.

her

her emancipation. And the rule is the same where a *Mokâtiba* marries with her owner's consent, and afterward becomes free.—Ziffer says that a *Mokâtiba* has no right of option, because the contract of marriage proceeded by, and was executed with, her especial consent, and she receives the dower *, and such being the case, she can have no subsequent right of option: contrary to the case of an absolute slave, whose consent in marriage is not regarded.—The argument of our doctors is that the reason for her right of option, (to wit, the accession, to the husband, of an *additional authority* with respect to her,) appears in the case of a *Mokâtiba*, the same as in that of an absolute slave, for before freedom the term of her *Edit* was only *two* menstruations, and she was subject to no more than a duplicate sentence of divorce; whereas, in her state of freedom, her *Edit* includes *three* menstruations, and she is subject to *three* divorces.

IF a female slave marry without her owner's consent, and be afterwards made free, her marriage then becomes legal and valid, because, being of sound mind and mature age, she is competent to the declaration and acceptance; moreover, the illegality of the marriage was on account only of the owner's right, which being done away, it remains lawful: and the woman has not any option, as in the former case, because the marriage is not in this case valid until after emancipation, which consequently occasions no accession of power to the husband; and hence the case is the same as if she were to bestow herself in marriage after emancipation.

but not otherwise.

IF a man marry a female slave, without her owner's concurrence, on a dower of a thousand *Dirms*, her *proper* dower being one hundred *Dirms* only, and he have carnal connexion with her, and her owner afterwards emancipate her, the specified dower goes to him [the

Case of a man marrying a female slave without her owner's consent.

* In opposition to the case of an *absolute* slave, whose dower is received by her *Mawla*, or proprietor, and by him appropriated.

owner,] because the husband has here obtained possession of an article which was the property of the owner, who is therefore entitled to the return: but if the marriage be not consummated until *after* emancipation, the specified dower goes to the woman, because in this case the husband appears to have obtained possession of an article which was her property, and she of course is entitled to the return, since the marriage, in consequence of her emancipation, takes effect from the period of the contract; and hence the specification of the dower is valid, and that which was specified is incumbent; and accordingly, no other dower is due on account of carnal connexion previous to the efficiency of the marriage, where that has been suspended [upon the event of the owner's approbation, or the slave's freedom,] because the marriage deriving its legality from the original contract, its efficiency is considered as existing from the instant the marriage takes place; nothing, therefore, but one dower can be due.

Case of a father cohabiting with the slave of his son.

IF a father enjoy the female slave of his son, and she produce a child, and he [the father] claim it, the slave becomes his *Am Walid*, and he is answerable to his son for her value; but he is not so for her dower, because a father being at liberty to possess himself of the property of his son, whenever that may be requisite to his own preservation, it follows that he may possess himself of his son's slave, where he requires her for the preservation of his progeny, since he thereby provides for his own continuance, he being virtually continued in his offspring; but the preservation of his progeny being a matter of less immediate importance than that of his *life*, he must pay a price in exchange for the slave, whereas he might take his son's *viçtuals* without paying any price.—And here the father's property in the slave is established antecedently to his claim of the child, possession being a condition essential to such claim, which does not hold good unless he be either fully possessed of her in all respects, or at least have a right of possession in her; and neither of these exist in him, (inasmuch that he might legally *marry* her;)—it is therefore requisite that his property

perty in her be considered as existing *a priori*; and this being admitted, the father appears to have had carnal connexion with his own slave, and consequently is not subject to the payment of an *Akir*.—*Ziffer* and *Shafëi* maintain that the slave's dower is a debt upon the father; because they hold that his property in her is a consequence of his *Isteelad*, or claim of the child,—that is, that his right of possession is is thereby established, the same as in a partnership slave; now the effect of a thing is not found until after that thing has taken place; and such being the case, as the carnal connexion appears to have been had, in the first instance, with the property of another, a dower is due.

IF a man marry his female slave to his father, and she produce a child, she does not become *Am Walid* to the father, neither is her price a debt against him, because he is answerable for her dower: and the child born of her is free, such a marriage being approved by our doctors.—This is contrary to the doctrine of *Shafëi*, according to whom a marriage of this kind is illegal. The argument of our doctors is, that the slave is not at all the property of the father, because, the son being her proprietor in every respect, it is impossible that the father should be so in any view; the son, moreover, is endowed with privileges [in regard to her] which do not appertain to his father, such as selling or bestowing her in marriage, or emancipating her, which evinces that the father is not in any respect her proprietor, although, in a case where he has carnal connexion with her, punishment drops, on account of erroneous possession; and his marriage with her being admitted as legal, the conservation of his seed is effected by means of marriage, [not by means of *Isteelad*,] so that his property in her is no way established [by the circumstance of her bearing a child to him,] and consequently she does not become his *Am Walid*.—And here the father is not answerable for the value either of her or of her child, as he does not become proprietor of either; but he owes her dower, he having taken that upon him by his marriage; and the child is free, be-

Case of a son
contracting
his female
slave in mar-
riage to his
father.

cause his owner would otherwise be his brother; and he is virtually emancipated of course.

The marriage of a free woman with a slave is annulled by her procuring his emancipation.

IF a free woman, being the wife of a slave, should say to the proprietor of such slave, "Emancipate him on my behalf for a thousand *Dirms*," and he accordingly emancipates him, the marriage is annulled.—*Ziffer* maintains that it is not annulled.—Our doctors argue, on this occasion, that the slave obtains his freedom from the woman, whence it is that the right of *Willa* rests with her, and also, that if she were under obligation to perform an expiatory act, and intend her husband's release to stand as such, her expiation is thereby fulfilled.—With *Ziffer* the emancipation is held to proceed from the owner, because the woman has required him to emancipate the slave "*on her behalf*," which is absurd, since manumission cannot take effect upon a slave who is not the property of the emancipator; consequently, her requisition being improper, emancipation is to be regarded as proceeding solely from the owner.—Our doctors, on the other hand, say that there is *one* mode in which the requisition of the woman may be rendered proper, *viz.* by considering her property in the slave to have existence previous to emancipation, as an essential, (for her right of possession is a condition of the validity of emancipation on her behalf,) and such being the case, her requisition "*emancipate him, &c.*" bears the construction of her desiring the owner first to transfer to her his property in the slave for such a consideration, and then to emancipate him "*from her*;" and the reply of the owner, "*I have emancipated him*," is as if he were to say that he had transferred him, and then set him free "*from her*;" and upon the woman's property in him being established, it necessarily follows that the marriage is annulled, the marriage of a free woman with her slave being illegal, since possession by right of property is irreconcilable with possession by matrimony.—But if the woman were to say to the owner of her husband "*emancipate him from me*," without mentioning any consideration, in this case the marriage is not annulled, and the *Willa* rests with the master.

master. This is according to *Haneefa* and *Mohammed*.—*Aboo Yoosaf* says that this and the preceding case are the same, and that the marriage is here likewise annulled, because in this instance also the transfer must be supposed to have previously taken place, (though without any return,) in order that the act may be lawful.

OBJECTION.—Transfer of property, without a return, amounts to *gift*, and that is not valid without *seizin*; now here *seizin* does not appear; consequently how can the transfer be valid?

REPLY.—*Seizin* is not in this case regarded, any more than in *Zihâr*; thus, if the expiation of *Zihâr* were incumbent upon any person, and he were to desire another to give the victuals*, as from him, and the other do accordingly, the gift is understood independent of *seizin*; and so here likewise.—The argument of *Haneefa* and *Mohammed* is that *seizin* being declared, in the ordinances of the prophet, to be a condition of gift, cannot be dispensed with; neither can it be established merely by supposing or assuming it, as an essential, because *seizin* is a *sensible act*,—contrary to *sale*, which is a legal transaction: and in the case of expiation, as cited by *Aboo Yoosaf*, the poor stand as the deputies of the expiator, in the *seizin* of the victuals, but the slave (in the case here treated of) cannot stand as the wife's deputy, because nothing is received by him, so as to constitute him her deputy in *seizin*.

* Book of Divorce, Chap. IX.

CHAP. V.

Of the Marriage of Infidels.

The marriage
of an *Infidel*
couple is not
dissolved by
their jointly
embracing
the faith,

IF an *Infidel* man and woman marry without witnesses, or whilst the woman is in her *Edit* from a former *Infidel* husband, and this be no objection by the rules of their own sect, and they afterwards embrace the faith together, their marriage remains valid.—This is according to *Haneefa*.—*Ziffer* maintains the marriage to be invalid in either case,—(that is to say, whether it be entered into without witnesses, or during the woman's *Edit*,) but that *Infidels* are not liable to be called to an account until they embrace *Islâm*, or until they appeal to the law,—that is to say, carry the matter before the judge.—The two disciples coincide with *Haneefa* in the first case, [the defect of witnesses,] but agree with *Ziffer* in the last [the *Edit*.] The argument of *Ziffer* is that the word of the sacred writings extends to all men alike, and consequently to *Infidels*; but the parties, as being *Zimmes*, are not liable to molestation; but this exemption from molestation is an effect of indulgence, and does not proceed from any idea of the marriage being legal; and of course, where it becomes a subject of litigation, or the parties become *Mussulmans*, separation must ensue, the illegality of their marriage still remaining.—The arguments of the two disciples are that the illegality of *Poliandry* is universally admitted amongst *Mussulmans*, and that *Infidel* subjects have engaged to follow the temporal law in all such points as are universally admitted; but with respect to the illegality of marriage without witnesses there subsists a difference of opinion among the *Mussulmans*; and *Infidels* have engaged only to follow such temporal laws of *Islâm* as are *universally* admitted, and not such as are *disputed*; hence, in the case

case of *Poliandry* a separation becomes necessary, but not in the case of marriage without witnesses.—*Haneefa* argues that the marriage is not rendered illegal by the injunctions of the law, because those injunctions are not addressed to *Infidels*; neither does any reason exist why the *Edit* should be obligatory on account of the right of a husband who has no faith in the necessity of it: contrary to a case where the *Infidel* woman is the wife of a *Mussulman*, because he has faith in the necessity of *Edit*; and therefore the illegality of her marriage [with the *Infidel*] should in this case be established, on account of his [the *Mussulman's*] right; and the marriage being valid *abinitio*, on account of no illegality appearing therein, continues to exist as such, since testimony is not a condition with respect to the period of its existence; and the circumstances of appeal to the law, or of conversion to the faith, take place during the existence of the marriage: neither does the circumstance of the *Edit* forbid the continuance of the marriage; as when a man (for instance) has carnal connexion, erroneously, with the wife of another, in which case an *Edit* is incumbent upon the woman, but the marriage continues to hold good.

IF a *Majoosee* wed his mother or his daughter, and they afterwards become *Mussulmans*, they are to be separated. This holds with the two disciples, because a marriage within the prohibited degrees is universally admitted to be null, on which account the rule extends to *Infidels* as well as *Mussulmans*, (as before mentioned, from them, in the case of *Edit*,) and the parties, upon their conversion, being necessarily liable to molestation on account of such marriage, it follows that a separation must take place upon that event; and it holds also with *Haneefa*, because, although such marriage be deemed *lawful* in the *Rawáyet Saheeh*, yet the circumstance of the wife being within the prohibited degrees forbids the continuance of it after conversion, on which account separation is to take place: contrary to the circumstance

unless it be a marriage within the prohibited degrees;

stance of *Edit*, which (according to *Haneefa*) does not forbid the continuance of the marriage.

but if *one* of them only be converted, a separation takes place.

If only one of the parties be converted to the faith, a separation follows; but if one only appeal, *Haneefa* holds that separation does not take place: contrary to the opinion of the two doctors, according to whom separation takes place in this case also.—The reason, with *Haneefa*, for making this distinction between these two cases is, that the right of one party is not invalidated by the appeal of the other, as the faith of the one is not altered by the appeal of the other: but where one of the parties becomes a *Mussulman*, although the faith of the other be not altered by that event, yet the faith of an *Infidel* is not sufficient to controvert or oppose the *Islâm* of a *Mussulman*, as *Islâm* is the *subjector* and cannot be *subjected*.—But where both the parties enter into a litigation, it is universally agreed that separation takes place, because this mutual litigation amounts to both authorizing any third person to effect a separation between them, which if they were to do, the separation so effected would be legal.

Apostates are incapacitated from marrying.

It is not lawful that an apostate marry any woman, whether she be a believer, an *Infidel*, or an apostate, because an apostate is liable to be put to death; moreover, his three days of grace are granted in order that he may reflect upon the errors which occasion his apostacy; and as marriage would interfere with such reflection, the law does not permit it to him.

In like manner, it is not lawful that a female apostate marry any man, whether *Mussulman* or *Infidel*, because she is imprisoned for the purpose of reflection, (as above,) and her attention to her husband would interfere therewith: moreover, this circumstance of her imprisonment necessarily prevents the matrimonial intercourse;—now marriage is lawful, not in respect to *itself*, but to its *ends*,

and consequently, where these are defeated, it cannot be deemed in any respect legal.

WHENEVER either the husband or the wife is a *Mussulman*, their children are to be educated in the *Mussulman* faith. And if either one or other [of an *Infidel* couple] become a *Mussulman*, and they have infant children, those are to be considered as *Mussulmans*, in virtue of the *Islam* of one of their parents, because this is tenderness to the children.

If either the father or mother be *Mussulman*, their children are *Mussulmans*:

IF one of a married couple be a *Kitábee*, and the other a *Majoofee*, their children are to be regarded as *Kitábees*, because, in this also there is a degree of tenderness with respect to the children, as a *Majoofee* is worse than a *Kitábee*. This is contrary to the doctrine of *Shafëi*, who holds the infidelity of a *Majoofee*, and that of a *Kitábee*, to be equal: but with our doctors a *Kitábee* is held superior to a *Majoofee*.

or where one is of a superior order of *Infidels*, and the other of an inferior, their children are of the superior order.

WHEN the wife becomes a convert to the faith, and her husband is an *Infidel*, the magistrate is to call upon the husband to embrace the faith also; if he accede, the woman continues his wife; but if he refuse, the magistrate must separate them; and this separation, with *Haneefa* and *Mohammed*, is a *divorce*.—In like manner, if the husband become a *Mussulman*, and his wife be a *Majoofee*, the magistrate is to call upon her to embrace the faith also; if she accede, she remains his wife; but if she refuse, the magistrate must separate them; but this separation is not *divorce*.—*Aboo Yoosaf* has said that the separation is not divorce in either case.—What is here advanced of the magistrate calling upon the party to embrace the faith, is an opinion of our doctors.—*Shafëi* maintains that the magistrate is not to make any such requisition, because this is *molestation*, and we have engaged not to molest *Zimmees*, as they have entered into a contract of subjection to us.

Upon the conversion of one of the parties, the magistrate is to require the other to embrace the faith; and must separate them, in case of recusancy.

OBJECTION.—It would hence appear that the matrimonial right of possession should not terminate in this case; whereas *Shafei* also holds that it is terminated.

REPLY.—The matrimonial intercourse is not admissible between a *Mussulman* and an *Infidel*; for which reason it is that the matrimonial right of possession is terminated on the instant of conversion, where either party embraces the faith, before consummation, because in this case the right has not been confirmed; but, on the other hand, if conversion take place after consummation, the termination is delayed until the end of three menstruations, because the right has on this occasion been confirmed; as holds in divorce.—The argument of our doctors is, that, upon either party embracing the faith, the ends of marriage are defeated, on account of difference of religion; hence it is absolutely necessary that recourse be had to some means by which a separation may be effected;—now *Islâm*, as an act of piety, is incapable of being rendered a cause of separation; the *Infidel* party is therefore to be called upon to embrace the faith, in order that the ends of marriage may be answered by conversion, or that a cause of separation may be established in case of refusal. The reason upon which *Aboo Yoosaf* founds his opinion is that the occasion of separation, to wit, *refusing the faith*, may proceed from either the man or the woman; a separation, therefore, on account of such refusal, is not *divorce*, any more than on account of a right of property;—that is to say, if, of husband and wife, either become the owner of the other, a separation ensues; but this separation is not divorce; and so also in the present case.—In reply to this, *Haneefa* and *Mohammed* argue that the husband, when he refuses the faith, wilfully withholds the customary benevolence from his wife, where he has it still in his power to continue it to her, by becoming a *Mussulman*; and such being the case, the magistrate acts merely as his substitute, in effecting the separation; in the same manner as where a husband is *impotent*, or deprived of his *penis*; but a woman is not empowered to divorce, for which

which reason the magistrate cannot be regarded as her substitute in effecting the separation when she has refused the faith.

It is to be observed, that where the separation takes place on account of the woman's refusal of the faith, she is still entitled to her dower, provided her husband has consummated the marriage, as in this case her right has been confirmed by the carnal act; but if the marriage should not have been consummated she cannot receive any dower, because the separation has proceeded from her, and her right to the dower is not confirmed; thus the case here is the same as where a woman apostatizes, or admits the son of her husband to carnal connexion.

If the wife embrace the faith in a foreign country, and her husband be an *Infidel*,—or, if a foreigner there become a *Mussulman*, and his wife be a *Majooseea*,—the separation between them does not take place until the lapse of three terms of the wife's courses, when she becomes completely repudiated.—The reason of this is, that *Islám* cannot be made an occasion of separation, (as has been before observed;) and the requiring the other party to embrace the faith is impracticable, as the authority of the magistrate does not extend to a foreign land, nor is it acknowledged there; yet separation is indispensable for the removal of evil; the condition, therefore, of separation, (to wit, the lapse of three terms of the woman's courses,) must stand in the place of separation effected by the magistrate; and in this rule no distinction is made between a woman *enjoyed*, and one *unenjoyed*.—*Shafei* makes a distinction, on this occasion, between a woman enjoyed and one unenjoyed, in the same manner as he distinguishes between them when they reside in a *Mussulman* territory, and one of them embraces the faith; as has been before explained.

And if the conversion of either happen in a foreign country, separation takes place upon the lapse of the woman's term of probation.

When a separation takes place between husband and wife, in consequence of the conversion of the former, and the latter is an alien,

If the wife be an alien, she is not to observe an *Edit*,

from separation, in consequence of her husband's conversion.

alien, she is not subject to any observance of *Edit*, according to all the doctors.—*Haneefa* holds the rule to be the same, where the woman becomes a convert and her husband is an alien; that is, that the woman, in this case also, is not subject to any observance of *Edit*, but the two disciples maintain that she must here observe an *Edit* the same as would be incumbent upon her if she were to come into the *Mussulman* territory; as shall be hereafter demonstrated.

The conversion of the husband of a *Kitabee* does not occasion separation.

If the husband of a *Kitabee* become a *Mussulman*, their marriage still endures, because the marriage of a *Mussulman* with a *Kitabee* being legal *ab initio*, its continuance is so *a fortiori*.

Case of a convert removing from a foreign land into a *Mussulman* territory.

If either husband or wife become a convert to the faith in a foreign country, and afterwards remove thence into the *Mussulman* territory, a separation takes place between them:—this is contradicted by *Shafei*:—but if either party be brought, as a captive, out of the foreign country, separation takes place between them, according to all the doctors: if, however, both the parties be brought captives together, we hold that there is no separation; whereas *Shafei* says that separation takes place.—Hence it may be collected that the circumstance of the parties residing apart in different countries is held to be a cause of separation by our doctors, but not that of their capture; and that *Shafei* maintains the reverse of this opinion.—The argument of the latter is that separation of country is a cause of termination of authority, but has no effect in occasioning an absolute separation in this case, any more than where an alien resides under protection in a *Mussulmant* territory, whilst his wife remains in her own country; or where a *Mussulman* goes under protection into a foreign land, leaving his wife in the *Mussulman* territory; in neither of which cases would separation take place, and so in this instance likewise:—capture, on the other hand, leads to this, that the captive is the sole and exclusive property of the captor, which cannot be established without a termination of the former's marriage, as it is on the same principle that a

captive stands virtually released from all his debts.—Our doctors, in support of their opinion, argue that by separation of country all matrimonial intercourse between the parties, whether actual or consequential, is entirely broken off, and thus this separation resembles illegality by affinity; capture, on the other hand, occasions property in the person, which does not forbid marriage at first, for if a man contract his slave in marriage, it is lawful; and so, also, it does not forbid the continuance of the marriage; as in the case of purchase, where if a person should purchase a female slave, the wife of another, the marriage does not, on that account, become null.—And in reply to what *Shafei* has advanced with respect to capture,—it is admitted that this makes the captive the exclusive property of the captor, in respect to *substance*, but the object of marriage, (to wit, the use of the woman's person,) is not *substance*, and therefore capture does not annul the marriage: moreover, between a protected foreigner and his wife separation of abode does not virtually take place, as his ultimate intention is to return home, whence he may be regarded, virtually, as in a foreign country, during his residence in the *Mussulman* territory.

If a woman come out of a foreign country into the *Mussulman* territory, and there become either a *Zimmee*, or a convert to the faith, it is lawful for her to marry*; and *Haneefa* holds that she is not under any obligation to observe an *Edit*.—The two disciples say that she must observe an *Edit*, because separation takes place upon her entering the *Mussulman* territory, and she then becomes subject to the *Mussulman* laws.—The argument of *Haneefa* is that the *Edit* is a consequence of an antecedent marriage, enjoined on account of the importance of the matrimonial tie; but this tie is of no importance whatever with respect to foreigners, for which reason it is that *Edit* is not enjoined upon a woman who is a captive.

A woman, retiring from a foreign into a *Mussulman* country, is at liberty to marry;

* Although she be already married in the foreign country.

but, if pregnant, she must wait until her delivery.

IF the woman in question be pregnant, she must not marry until she be delivered.—This is the doctrine of the *Zâbir Zawâyet*.—It is recorded from *Haneefa* that her marriage is approved; but her husband must not have carnal connexion with her until after her delivery, as is the rule with women pregnant by fornication.—The ground of the former opinion is that the parentage of the *fœtus* is ascertained [as from some *alien*,] and therefore the former matrimonial tie is regarded, with respect to the establishment of parentage, and must consequently be so, with respect to forbidding her marriage likewise, on a principle of caution.

In a case of apostacy, separation takes place, without divorce:

IF either husband or wife apostatize from the faith, a separation takes place, without divorce, according to *Haneefa* and *Aboo Yoosaf*.—*Mohammed* alleges that, if the apostacy be on the part of the husband, the separation is a *divorce*, because he conceives an analogy between this case and that of the husband refusing the faith; for as, in the latter instance, he by his refusal appears wilfully to withhold the customary benevolence from his wife, where he has it still in his power to continue it to her, so likewise in the former, by his apostacy.—*Aboo Yoosaf* holds here to his opinion as before recited in the case of *refusal*.—*Haneefa* makes a distinction between refusal of the faith and apostacy from it; and his reason for this distinction is that apostacy annuls marriage, because the blood of an apostate no longer remains under the protection of the law, and his life is *Mobah* [free to any one to take;] now divorce is used for the purpose of dissolving a marriage which actually exists; and hence apostacy cannot possibly be considered as divorce: contrary to the case of refusal of the faith, because it is on account of the ends of matrimony being thereby defeated that separation is enjoined, in that instance, as has been already said; and for this reason it is that the separation is there suspended upon a decree of the magistrate, whereas in apostacy it takes place without any such decree.—It is to be observed, however, that if the apostacy be on the part of the *husband*, his wife is entitled to her whole dower where he has had carnal

carnal connexion with her, or to *half* her dower in defect of this:— and where the apostacy is on the part of the *wife*, she is in like manner entitled to her *whole* dower, if her husband has had carnal connexion with her; but if not, she has no claim whatever either to dower or alimony, because the separation is in this case a consequence of her own act.

IF the husband and wife should both apostatize together, and afterwards return to the faith at the same time, their marriage is, by a favourable construction of the law, permitted to endure.—*Ziffer* says that it is annulled, because the apostacy of any one of them forbids the duration of it, and where that appears in *both*, it is found in *one* of them:—but our doctors, in support of their opinion, cite an instance recorded to have happened in the time of the blessed companions [of the prophet,] when the tribe of *Binney Haneefa*, after having apostatized, returned to the faith, and the companions did not direct them to renew their marriage; and their apostacies were all considered as having taken place at the same time, because of the uncertainty of the dates.—But if, after their joint apostacy, either the husband or wife were singly to return to the faith, their marriage is dissolved, because here one of them persists in apostacy, and that forbids the continuance of marriage, the same as it does the matrimonial engagement at first.

but if man and wife apostatize together, their marriage still continues.

CHAP. VI.

Of *Kissm*, or *Partition**.

A man must
cohabitequal-
ly with all his
wives:

IF a man have two or more wives, being all free women, it is incumbent upon him to make an equal partition of his cohabitation among them, whether he may have married them as *virgins* or as *Siyeebas*, or whether some of them be of the former description, and others of the latter;—because the prophet has said, “*The man who bath two wives, and who, in partition, inclines particularly to one of them, shall in the day of judgment incline to one side,*” (that is to say, *shall be paralytic*;) and it is recorded by *Aysba* that he made such equal partition of cohabitation among his wives,—saying “*O God, I thus make an equal partition as to what is in my power; do not therefore bring me to account for that which is not in my power,*” (by which he means the *affections*, these not being optional.)

THE wife of a prior marriage, and a new wife, are alike in this point, because the tradition above cited is general in its application, and also, because partition is one of the rights of marriage, and in these both descriptions of wives are equal.

but the mode
of partition is
left to him-
self.

It is left to the husband to determine the measure of partition; that is to say, if he choose, he may fix it at one day of cohabitation with each of his wives, successively, or more: and it is also to be remarked that by the equality of partition incumbent upon the husband

* By *Kissm* is understood that equal partition of cohabitation which a husband is required, by law, to make among his wives, where he has a plurality of them.

is to be understood simply *residence*, but not *coition*, as the latter must depend upon the erection of the virile member, which is not a matter of option, and therefore, like the affections, not always in the husband's power.

IF a man be married to two wives, one of them a free woman, and the other a slave, he must divide his time into three portions, cohabiting two portions with the former and one with the latter, because the same is recorded of *Alee*; and also, because, as it is lawful to marry a free woman upon a slave, but not a slave upon a free woman*, it hence appears that the rights of the former in marriage are short of those of the latter.—And a *Mokâtiba*, *Modâbbira*, or *Am-Walid*, are, with respect to their right of partition, the same as *slaves*.

Partition, where the wives are of different rank or degree, must be adjusted accordingly.

WOMEN have no right to partition whilst their husband is upon a journey, and hence, during that period, it is at his option to carry along with him whomsoever he pleases; but it is preferable that he cause them to draw lots, and take with him on the journey her upon whom the lot may happen to fall.—*Shafëi* says that the determination of this point by lots is *incumbent* upon the husband, because it is recorded of the prophet, that whenever he intended a journey he caused his wives thus to draw lots.—Our doctors, however, alledge that the prophet's reason for this was only that he might satisfy the minds of his wives; wherefore drawing lots is *laudable* merely, because a man's wives have no claim whatsoever to partition during the period of their husband being on a journey, since he is at liberty not to carry *any* of them along with him, and consequently it is lawful for him to take any *one* of them.

Partition is not incumbent whilst the husband is on a journey.

THE time of a journey is not to be counted against a husband;—that is to say, he is under no obligation, on his return, to make up

* By marrying one woman upon another is to be understood a man marrying a woman when he is already possessed of a wife; the expression is merely idiomatical.

for the partition lost within that time, by a proportionable cohabitation with the wife or wives whom he may have left at home, they having no claim whatever to his cohabitation with them during such period.

If one wife bestow her turn [of cohabitation] upon another, it is lawful; because *Soolah* the daughter of *Zooma* gave up her turn to *Aysba*: but if a woman give up her turn, she is not at liberty to resume it, because she drops a right which is not as yet established in her, and absolute derilection cannot take place unless it be of a right already established,—wherefore her resumption here is as if she were to withhold from bestowing her turn upon the other.

H E D A R A.

B O O K III.

Of R I Z A, or F O S T E R A G E.

R I Z A, in its legal sense, means a child sucking milk from the breast of a woman for a certain time, which is termed the *period of fosterage**.

Definition of the term.

PROHIBITION is attached to fosterage, in whatever degree, if it be found within the usual period of infants subsisting at the breast.—*Shafii* says that prohibition is not established unless the child have

Degree of fosterage which occasions prohibition.

* Fosterage, with respect to the prohibitions occasioned by it, is of two kinds; FIRST, where a woman takes a strange child to nurse, by which all future matrimonial connexion between that child and the woman, or her relations within the prohibited degrees, is rendered illegal; SECONDLY, where a woman nurses two children, male and female, upon the same milk, which prohibits any future matrimonial connexion between them.

sucked the breast at least five different times, inasmuch that if an infant were to suck for any particular space of time, whether a *day* or an *hour*, uninterruptedly, this would not occasion prohibition, because the prophet has said “*Sucking, or giving suck, for once or twice, does not render prohibited.*”—Our doctors support their opinion upon the authority of the sacred text, God saying, in the *Koran*, “YOUR MOTHERS WHO HAVE SUCKLED YOU ARE PROHIBITED UNTO YOU;”—and also upon a precept of the prophet, that “*whatever is prohibited by consanguinity, is also prohibited by fosterage,*”—where no distinction whatever is made between a smaller and a greater degree of it.

OBJECTION.—A greater degree of fosterage is essential to the establishment of prohibition, because the latter is here founded solely in an apprehension of a participation of blood*, on account of the growth and increasing bulk of the body, which cannot take place without fosterage, in a considerable degree; moreover, it occurs in the traditions that fosterage is the source of a child's growth.

REPLY.—Although prohibition be founded in an apprehension of a participation of blood, on account of growth, yet that is a point which is incapable of being absolutely ascertained, and hence prohibition by fosterage is attached, *not* to the *degree*, but to the *mere act* of fosterage, which is the occasion of such increase of growth: and with respect to the saying of the prophet, as mentioned by *Shafeï*, our doctors reply that if the date of descent† of the text [of the *Koran*] before quoted was *posterior* to that of this saying, its authority is thereby superseded, and if it was *prior* thereto, yet the saying is rejected, because it contradicts the text.

* Arab. *Jazeeyat*, a term which has no sense in our dictionaries in any manner applicable to the present case. It appears, from the context, to signify a participation of bodily substance, causing two persons to partake of one common nature.

† The *Koran* was declared by *Mohammed* to have been delivered down to him in different portions at various times, and those he termed the *Noozools*, or descents.

THE period of fosterage is *thirty months*, according to *Haneefa*.—The two disciples hold it to be *two years*, and of the same opinion is *Shafei*.—*Ziffer* maintains that it is *three years*, because something in addition to *two years* is absolutely requisite, (according to what shall be hereafter shewn,) and such addition is fixed at one year, because that space admits of the child's state undergoing a complete alteration.—The argument of the two disciples is the word of God, to wit, “HIS [the child's] TIME IN THE WOMB*, AND [until] HIS WEANING IS THIRTY MONTHS:”—now the smallest space of pregnancy is six months, and hence two years remain for fosterage; moreover, the prophet has said that “*after two years there is no fosterage*.”—The arguments of *Haneefa* are twofold; FIRST, the text already quoted, where it appears that GOD makes mention of two things, one the *Hamal*, [or time of gestation,] and the other the *Fisâl*, [or weaning,] for both of which he indiscriminately mentions one period, namely, *thirty months*, wherefore it applies to each *in toto*; the same as in a case of two debts; that is to say, if a man (for example) were to make a declaration that he owed such a person “one thousand *Dirms*,” and five bushels of wheat, payable within two months,” this period of two months applies to each debt equally, and so in this case likewise. It may indeed be objected that, admitting this, it would follow that the time of being in the womb is also *thirty months*, whereas it is otherwise,—pregnancy being by law restricted to *two years*: but to this we reply, that there is a cause of restriction short of that period operating upon *Hamal*, (it being recorded in the traditions that a child does not remain in the womb of the mother above two years,) whereas there is none upon *Fisâl*, which of course stands as it appears to be: moreover, as a sucking child is nourished at the breast for *two years*, so is it also after the expiration of that term; for the weaning is not precisely determined to any particular period, but is effected by de-

Length of the
period of fos-
terage.

* Arab. *Hamal*. By this is generally understood *pregnancy*; but as the text here quoted has reference to the *child*, and not to the *mother*, the translator is under the necessity of rendering it in a phrase applicable to the *former*.

grees, as the child insensibly forgets the breast and inclines to other food; it is therefore necessary that some space for fosterage be allowed in addition to the two years, and this additional space is fixed at six months, being the shortest term of pregnancy, as the lapse of that period affords a reason for altering the manner of the child's subsistence, because the subsistence of a *fœtus* is irreconcilable with that of a *suckling**; and with respect to the traditionary saying of the prophet, as cited by the two disciples, it has reference solely to the period of the *claim* of fosterage; that is to say, it only goes to shew that no obligation arises from fosterage, so as to render payment or hire for the same obligatory upon the [child's] father, beyond the space of *two years*; and the text of the *Koran*, which says "MOTHERS SHOULD SUCKLE THEIR CHILDREN FOR TWO YEARS," has also reference to the period of the claim of fosterage.

Sucking beyond the term of fosterage is not an occasion of prohibition.

If a child continue to suck after the proper period of fosterage is elapsed, prohibition is not hereby established†; because the prophet has declared that there is no fosterage after the expiration of the proper period; and also, because prohibition is not established by any fosterage, except such as is a cause of growth and increase, which are obtained only by the fosterage within its proper period, since grown up persons would not find any effectual nourishment from sucking.

A CHILD's forsaking the breast before the expiration of the period of fosterage is not regarded; that is to say, if a child withhold from taking its milk before the period of fosterage has elapsed, and there be

* That is to say, it is to be supposed that within the last six months the woman may have conceived, and may, at the end thereof, produce a child; and a woman cannot, without injuring the *fœtus*, give suck to another, either during or after her pregnancy.

† That is to say, if, after the expiration of the proper period of fosterage, another child be brought to the breast, and the former nursling still continue to suck, these two are not hereby prohibited to each other in marriage, although they would have been so if they sucked together during the fosterage of the first child.

still milk in the mother's breast, and any other infant suck the milk before the expiration of that period, in this case prohibition by fosterage is established between those children.—This is the *Zábir Rawáyet*.—*Hasan* has recorded it as an opinion of *Haneefa*, that this is the case only where the first child has not as yet become attached to another species of food, so as to be capable of subsisting altogether without milk; but if the child have adopted intirely another species of food, this circumstance is to be considered as a weaning, and prohibition by fosterage cannot in this case be established, because where the child is arrived at such a state as that other food suffices, the manner of its subsistence is altered, and that growth and increase which the child derived from sucking is at an end, wherefore the property of *participation of blood*, which is the occasion of prohibition, is not afterwards found.

Is the suckling of a child, after the expiration of the period of fosterage, allowable or not?—Upon this point there are various opinions: some have said that it is not so, because the act of suckling at all is permitted solely out of necessity, the milk being a constituent part of the woman's frame, the use of any portion of which, except as a matter of *necessity*, is prohibited; and this necessity ceases upon the expiration of the period of fosterage.

“ *Whatever is prohibited by CONSANGUINITY is so likewise by FOSTERAGE,*” (according to the saying of the prophet already quoted,) except a sister's mother by fosterage*, whom it is lawful for a man to marry, although he cannot lawfully marry his sister's mother by blood, as she must either be his own mother, or the enjoyed of his father, both of whom are prohibited to him; contrary to her mother by fosterage.—A sister's mother by fosterage may be conceived in three different ways;

Exceptions from the general rule of prohibition by fosterage.

* This is a very equivocal and vague expression, as appears by the succeeding definition of the various descriptions to which it applies.

FIRST,

FIRST, where a man has a sister by blood, who has a foster-mother, whom he may lawfully marry;—SECONDLY, where a man has a foster-sister, who has a mother by blood, whom he may likewise lawfully marry;—and THIRDLY, where a male and female infant, between whom there is no affinity, suck at the breast of one woman, and the female infant also sucks at the breast of another woman, in which case the male infant may lawfully marry the last woman, who is the foster-mother of the female infant, (that is to say, of his foster-sister.)

A MAN may also lawfully marry the sister of his foster-son, although it be not lawful for him to marry the sister of his son by blood, as she must be either his own daughter, or the daughter of his enjoyed wife, both of whom are prohibited to him.

Cases of illegality induced by fosterage.

It is not lawful for a man to marry the wife of his foster-father, or of his foster-son, (in the same manner as he is prohibited from marrying the wife of his *natural* father or son,) because of the tradition before quoted.

OBJECTION.—It has been declared, in the sacred writings, that it is lawful for men to marry the wives of their sons by blood, and this particular restriction to *blood* should seem to imply that marriage with the wives of foster-sons was lawful; whereas it is otherwise.

REPLY.—The restriction above mentioned refers to the exclusion of the wives of children by *descent*, and not to the exclusion of the wives of *foster-sons*, for the reasons already mentioned.

PROHIBITION is attached to the milk of the man, (that is to say, to the milk of which he is the cause;) if, for example, a woman nurse a female child, the latter is prohibited to her husband, and to his father and son, because the husband, through whom the woman's breasts have been filled with milk, is as a father to that child.—It is recorded, as an opinion of *Shafëi*, that prohibition is not attached to the

the milk of a man; because this prohibition arises from an apprehension of participation of blood, and the milk is a secretion from the blood of the *woman*, and not of the *man*.—The arguments of our doctors in this case are threefold; FIRST, the saying of the prophet, as before quoted, “*Whatsoever is prohibited by consanguinity is also prohibited by fosterage*,”—and prohibition by consanguinity being found in both father and mother, it follows that it is found in both these relations by fosterage;—SECONDLY, the prophet once said to *Aysba*, (who had complained to him of *Afla*, the brother of *Aboo Keis*, appearing before her whilst she had only a single cloth upon her,) “*The act of AFLA, in thus approaching you, is of no consequence, as he is your paternal uncle by fosterage*,” which proves that affinity by fosterage is established on the *paternal* side, and that as the woman who suckles is the child’s mother, so is her husband its father, by fosterage;—THIRDLY, the man is the *cause* of the entrance of the milk into the woman’s breasts, and therefore the milk is, out of caution, to be regarded (with respect to the point of prohibition) as deriving its existence from *him*.

A MAN may lawfully marry the sister of his foster-brother, it being allowed to him to marry the sister of his brother by blood, (that is, the maternal sister of his paternal brother.)

It is to be observed as a rule that when a male and female infant suck from one breast, they are prohibited to each other in marriage, because they have one common mother, and are therefore as *brother and sister*.

It is not lawful for a female to marry any of the sons of the woman who has suckled her, because they are her brothers,—nor the sons of those sons, because they are her *nephews*.

It is not lawful for a male to marry the husband’s sister of the

woman who has suckled him, as she is his paternal aunt by fosterage.

Cases of admixture of the milk with any foreign substance;

IF the milk be drawn from the nurse's breast, and mixed with water, prohibition is still attached to it, provided the former exceed the latter in quantity; but if the water exceed, prohibition is not attached.—*Shaf'ei* maintains that prohibition is attached, in the latter case also, because there is actually some of the milk in that water, and therefore it is indispensably to be regarded, especially in a point of prohibition, that being a matter of caution.—To this our doctors reply that any thing less in quantity than that with which it is mixed is regarded as virtually non-existent, as in the case of a *vow*, for instance, where, if a man swear that “he will not drink *milk*,” and he afterwards drink it mixed with a greater proportion of water, he is not forsworn.

IF the milk be mixed with other food, prohibition is not attached to it, although the former exceed the latter in quantity. This is according to *Haneefa*. The two disciples say that if the milk exceed, prohibition is attached.—The compiler of the *Hedaya* remarks that this opinion of the two disciples proceeds upon a supposition that the milk and victuals do not undergo any culinary preparation after admixture; but that, if they be boiled, or otherwise prepared by fire, all the doctors admit that prohibition is not then occasioned.—The two disciples argue that regard is to be had to that which exceeds, (as in the case of mixing milk with water,) provided it have not undergone any change by boiling or other cause.—The argument of *Haneefa* is that the food is the *subject*, and the milk only a *dependant*, with respect to the end it is intended for, to wit, *sustenance*; the case is therefore the same as if the proportion of the *food* exceeded that of the *milk*.

If the milk be mixed with medicine in a proportion exceeding the

the latter in quantity, prohibition is attached to it, because the milk is designed for sustenance, which is the *end*, and the purpose of the medicine is only to strengthen the child's stomach, or to forward digestion.

If the milk of the nurse be mixed with that of an animal, in a proportion exceeding the latter in quantity, prohibition is attached to it; but not if the milk of the animal exceed the other; regard being here had to that which exceeds; as in the admixture of milk with water.

If the milk of one woman be mixed with that of another, in this case *Aboo Yoosaf* holds that regard should be had to the excess,—that is to say, that prohibition is attached to that woman's milk which exceeds the milk of the other in quantity,—because here the two milks, when mixed together, become as one substance, and hence the smaller quantity is to be considered, (in the effect produced,) as a dependant on the greater quantity.—*Mohammed* and *Ziffer* contend that prohibition is attached to both milks equally, as both are of the same nature, and a thing cannot be said to exceed a homogeneous thing, because the admixture with any article of a *homogeneous* nature adds to the *sum*, but does not occasion any destruction or change in the *matter*; and the end intended is the same in both.—There are two opinions recorded from *Haneefa* upon this subject, one coinciding with *Aboo Yoosaf*, and the other with *Mohammed*.

or with the
milk of an-
other woman.

If the breasts of a virgin should happen to produce milk, prohibition is attached to it,—that is to say, if a male child were to subsist upon it, the virgin becomes his mother by fosterage, and his marriage with her is prohibited, according to the word of God in the *Koran*, “YOUR MOTHERS WHO HAVE SUCKLED YOU ARE PROHIBITED UNTO YOU,” which text being generally expressed, applies to all women alike:—moreover, the milk of the virgin is a cause of

Prohibition is
occasioned by
the milk of a
virgin,

growth in the child, which induces an apprehension of *participation of blood*.

or of a corpse.

IF milk be drawn from the breasts of a deceased woman, prohibition is attached to it.—This is contrary to the opinion of *Shafëi*, who says that, in the establishment of prohibition by fosterage, the primary subject of such prohibition is the woman whose milk has been sucked by the child, the prohibition pervading through the medium of that woman to others [her relatives,] but, by her decease, the original subject of prohibition is removed, she being then a dead substance; whence it is that if a man were then to commit the carnal act with her, he would not be subject to the punishment of fornication, nor would prohibition by affinity be by that act established. The argument of our doctors is that prohibition by fosterage arises from an apprehension of participation of blood, which appears in the increasing growth of the [child's] body, and this last is occasioned by milk; as in the present case.

Cases in which milk does not occasion prohibition.

IF a woman's milk be administered to a child in a glyster, prohibition by fosterage is not attached to it.—This is the doctrine of the *Zâhir Rawâyet*.—It is recorded from *Mohammed* that prohibition is thereby established, in the same manner as a fast would be vitiated by it:—but the reason of this apparent inconsistency (according to the *Zâhir Rawâyet*) is that the cause of violating the fast is the restoration of the body, which is effected by the glyster; whereas the cause of prohibition by fosterage is the increase of the body's growth, which is not thereby effected, nothing being sustenance to men except what is administered by the *mouth*.

IF a man's breasts should happen to produce milk, prohibition is not attached to it, because the substance thus produced is not, in fact, *milk*, and consequently increase of growth is not obtained by means of it.—The principle upon which this proceeds is that *milk* cannot

cannot be secreted in the breasts of any person but one who is capable of child-bearing.

PROHIBITION by fosterage is not attached to the milk of a goat (or other animal;)—that is to say, if two infants, a male and a female, were to subsist together, upon the milk of one goat, prohibition by fosterage is not established between them, because between mankind and brutes there can be no participation of blood, (that is to say, such participation as would occasion affinity,) and prohibition by fosterage arises from participation of blood.

If a man marry an infant and an adult, and the latter should give milk to the former, both wives become prohibited with respect to that man [their husband,] because, if they were to continue united in marriage to him, it would imply the propriety of joint cohabitation with the foster-mother and her foster-daughter, which is prohibited, in the same manner as joint cohabitation with a *natural* mother and daughter.—It is to be observed on this occasion, that if the husband should not have had carnal connexion with the adult wife, she is not entitled to any dower whatever, because the separation has proceeded from her, before consummation:—but the infant has a claim to her *half* dower, the separation not having proceeded from her.

Case of one
of two wives
suckling the
other.

OBJECTION.—The separation proceeds from her, because sucking the milk from the breast was her act.

REPLY.—Although the sucking was certainly her act, yet the act of such an one is not considered as destructive of her right, for which reason it is that if she should happen to kill her heir, this would not set aside her right of inheritance.—If, moreover, it should appear that the adult had acted with any sinister view of dissolving the marriage, the husband is in this case empowered to take from her the half dower which he pays to the infant; but not unless she have acted with such a view, even though she were aware of the infant being the wife of her husband. It is recorded from *Mohammed*, that the husband is authorized

rized to take the infant's half dower from the adult, in either case,—that is to say, whether a dissolution of the marriage may have been her intention or not; but the former (which is the *Zábir Rawáyet*) is the more orthodox opinion, because, although the adult has by her act fixed and rendered binding upon the husband the half dower aforesaid, (which had before stood within the possibility of dropping*,) and her so doing amounts to a damage, yet she here stands (*not* as the *actual perpetrator*, but) as the cause of the damage, since the act of giving her milk to the infant is not the occasion of dissolving the marriage any further than as it induces a consequence of joint cohabitation with a *step-mother* and *step-daughter*:—moreover, the annulling of a marriage is not what renders a dower obligatory, but is rather the occasion of its dropping; but the *half* dower is incumbent, in the manner of a *Mátat*, or present, in compliance with established custom; and the annulling of the marriage is the condition of its becoming incumbent; and in this view the adult is the *cause* of the damage; and as being the *cause* only, and not *the actual perpetrator*, transgression is made a condition of her responsibility, the same as in the case of digging a well,—that is to say, if a person were to transgress, in digging a well, by sinking it in another person's ground, or in the highway, he is responsible for the *Deeyat* of any one who might happen to fall into it, whereas, if the well were sunk in his own ground, he would not be responsible:—now this transgression is not found in the adult, unless where she is aware of the infant being the wife of her husband, and that her view in suckling it is a dissolution of the marriage; but where she is not aware of that circumstance, or being so, yet gives her milk, *not* with any view of dissolving the marriage, but rather, of preserving the infant from perishing, in neither of these cases is transgression supposed to exist; and, in the same manner, it

* That is to say, the obligation of which might possibly have been annulled or cancelled by the occurrence of some accident previous to the payment of it, such as the decease of the infant before consummation of the marriage, &c.

does

does not exist, if she knew that the infant is the wife of her husband, but be not aware that her suckling it will occasion a dissolution of the marriage.

OBJECTION.—No regard is paid to ignorance of the law in a *Musfulman* territory; how, therefore, can ignorance be pleaded in her excuse in the present case?

REPLY.—Regard is here paid to her ignorance, not in order to avert the sentence of the law, (which induces responsibility upon her,) but solely to avert the construction of intent of dissolution, or of wilful transgression, to which her act might otherwise be liable, and which being thus disproved, she is exonerated from responsibility, as these are the only causes thereof, and neither of them can apply to her.

THE evidence of *women* alone is not sufficient to establish fosterage; nor can it be established but on the testimony of two men, or of one man and two women.—*Imâm Mâlik* has said that it may be established on the evidence of one woman, provided she be an *Adil*, because prohibition is one of the rights of the law, and may therefore be established upon a single information,—as, for instance, where a person purchases flesh meat, and any one bears testimony to its being part of a *Majoosee* sacrifice, in which case prohibition is established with respect to it.—The argument of our doctors is that the establishment of prohibition in marriage is in no respect different from the extinction of a right of possession; and the annulling of a right of possession cannot take place but upon the evidence of two men, or of one man and two women:—contrary to the case of *flesh meat*, as the prohibition to the eating may be established without affecting the proprietor's right of possession, it still remaining his property under that prohibition:—the prohibition of this article, therefore, appears to be merely a matter of *religion*, and in which, consequently, a single evidence suffices.

Evidence to fosterage requires the full number of witnesses.

H E D A Y A.

B O O K IV.

Of TALÂK, or DIVORCE.

Definition of
the term.

TALÂK, in its primitive sense, means *dismissal*:—in law it signifies the dissolution of a marriage, or the annulment of its legality, by certain words.

Chap. I. Of the *Talâk-al-Sonna*, or Regular Divorce.

Chap. II. Of the Execution of Divorce.

Chap. III. Of Delegation of Divorce.

Chap. IV. Of Divorce by a Conditional Vow.

Chap. V. Of the Divorce of the *Sick*.

Chap. VI. Of *Rijât*, or returning to a divorced Wife.

Chap.

Chap. VII. Of *Aila*.

Chap. VIII. Of *Kboola*.

Chap. IX. Of *Zibâr*.

Chap. X. Of *Laân*, or Imprecation.

Chap. XI. Of Impotence.

Chap. XII. Of the *Edit*.

Chap. XIII. Of the Establishment of Parentage.

Chap. XIV. Of *Hizânet*, or the Care of Infant Children.

Chap. XV. Of *Niskâ*, or Subsistence.

CHAP. I.

Of *Talâk-al-Sonna*, or *Regular Divorce* *.

DIVORCE is of three kinds;—FIRST, the *Ahsan*, or *most laudable*;—SECOND, the *Hoosn*, or *laudable*; (which are the distinctions of the *Talâk-al-Sonna*;)—and THIRD, the *Biddât*, or *irregular*.

Distinctions
of divorce.

THE *Talâk Ahsan*, or *most laudable divorce*, is where the husband repudiates his wife by a single sentence, within a *Tohr*, (or term of

Talâk Ahsan.

* *Talâk-al-Sonna* literally means “divorce, according to the rules of the *Sonna*,” in opposition to *Talâk Biddât*, which signifies a *novel*, *unauthorized*, or *heterodox* mode of divorce: the terms *regular* and *irregular* are here adopted, as being the most familiar.

purity *,) during which he has not had carnal connexion with her, and then leaves her to the observance of her *Edit*, or prescribed term of probation. This mode of divorce is termed the *most laudable*, for two reasons;—FIRST, because the companions of the prophet chiefly esteemed those who gave no more than one divorce until the expiration of the *Edit*, as holding this to be a more excellent method than that of giving three divorces, by repeating the sentence on each of the two succeeding *Tobrs*;—SECONDLY, because in pursuing this method the husband leaves it still in his power, without any shame, to recover his wife, if he be so inclined, by a reversal of the divorce during her *Edit*: this method is, moreover, the least injurious to the woman, as she thus remains a lawful subject of marriage to her husband, even after the expiration of her *Edit* †, which leaves a latitude in her favour unrebated by any of the learned.

Talāk Hoofn.

THE *Talāk Hoofn*, or *laudable divorce*, is where a husband repudiates an enjoyed wife by three sentences of divorce, in three *Tobrs*. *Imām Mālik* asserts that this method classes with the *Biddāt*, or *irregular*, and that no more than one divorce is admitted as unexceptionable, because, as being in itself a dangerous and disapproved procedure, it is only the urgency of release from an unsuitable woman that can give a sanction to divorce; and this urgency is fully answered by a single *Tobr*.—The arguments of our doctors on this topic are twofold; FIRST, a precept of the prophet delivered to *Ebn Amir*, “*One thing required by the SONNA is that ye wait for the TOHR, and pronounce a divorce in each TOHR*;”—SECONDLY, the propriety of a divorce rests merely upon the *proof* of the urgency, and not upon the establishment of the actual urgency itself, that being a matter concealed and unascertainable [but by virtual proof,] and the act of proceeding to

* Meaning the space which intervenes between the menstrual fluxes.

† Contrary to any other mode of divorce, as a wife repudiated in any other way cannot be again married to her first husband, unless she be previously married to, and divorced by another man.

divorce at a time when the desire of coition with the woman is fresh renewed, (to wit, at the recommencement of her *Tobr*,) is a proof of the urgency; and the repetition of divorce at the two subsequent returns of the *Tobr* amounts to no more than a repetition of the proof, and is therefore allowed of.—Some of the learned have said that, in this species of divorce, it is most adviseable that the husband delay pronouncing the first sentence of it until towards the termination of the *Tobr*, so as that the *Edit* may not be too much protracted; but it is evident that the husband should rather pronounce the divorce at the commencement of the *Tobr*, because, if he were to delay it, he might probably be tempted to have carnal connexion with the woman in the interim, under an intention of divorcing her, and then divorce her after such carnal connexion, which is forbidden.

THE *Talâk Biddât*, or *irregular divorce*, is where a husband repudiates his wife by three divorces at once,—(that is, included in one sentence,)—or, where he repeats the sentence separately, thrice within one *Tobr*; and if a husband give three divorces in either of those ways, the three hold good, but yet the divorcer is an offender against the law. *Talâk Biddât.*

SHAFEI has said that all these three descriptions of divorce are equally unexceptionable and legal, because divorce is in itself a lawful act, whence it is that certain laws have been instituted respecting it; and this legality prevents any idea of danger being annexed to it: moreover, divorce is not prohibited, even during the woman's courses, the prohibition there applying to the protraction of the *Edit*, and not to *divorce*.—Our doctors, on the other hand, say that divorce is in itself a dangerous and disapproved procedure, as it dissolves marriage, an institution which involves many circumstances as well of a temporal as of a spiritual nature; nor is its propriety at all admitted, but on the ground of urgency of release from an unsuitable wife; and there is no occasion, in order to procure this release, to give three divorces at

once, whereas there is an excuse for giving three divorces separately in three *Tobrs*, as this exhibits repeated proofs of the urgency of it:— and with respect to what *Shafëi* advances, that “the legality of divorce prevents any idea of danger being annexed to it,” we answer, that the legality of divorce, in one respect, (that is to say, inasmuch as it is a *destroyer* of *subjection*,) does not admit the idea of its being dangerous, but that, in another respect, (to wit, its occasioning the dissolution of marriage, which involves concerns both of a spiritual and temporal nature,) it must be considered as attended with danger.

THE pronouncing of two divorces within one *Tobr* comes under the description of *Biddât*, or *irregular*, the same as that of three divorces, as already intimated.

A QUESTION has arisen among the learned, whether the pronouncing of a single divorce irreverfible within one *Tobr* be of the description of *Biddât* or not?—*Mohammed*, in the *Mabfoot*, has faid,— “Whoever gives an irreverfible divorce, although it be within the *Tobr*, forfakes the *Sonna*, as there is no urgent neceffity for fuch a fentence to effect release from the wife, fince by the lapfe of the *Edit* that end is obtained;” but again, in the *Zeeadât*, he fays that this method is not to be reprobated, on account of the occafional urgency of immediate release, which by an irreverfible divorce is obtained, it not being then fufpended upon the lapfe of the *Edit*.

Points to be attended to in adhering to the *Sonna* divorce.

SONNA, [that is, attention to the mode prefcribed by the *Sonna*,] in divorce, appears in two fhapes, adherence to *number*, and to *time*; —to the former, by reftricting the fentence to that of a fingle divorce reverfible, in which the enjoyed and the unenjoyed wife are the fame;— and to the latter, (in which the *enjoyed* wife is folely confidered,) by pronouncing the divorce in a *Tobr* during which the husband has not had

had carnal connexion with her;—because it is the *proof* of urgency that is regarded; and the act of proceeding to a divorce at a time when the desire of coition with the woman is fresh renewed, (as at the recommencement of her *Tobr*,) is the best proof of such urgency; for during the actual time of the courses the woman is not an object of desire, and in a *Tobr* where she has been enjoyed desire is lessened towards her.—With respect to an unenjoyed wife, the *Tobr* and the courses are equal,—that is to say, the pronouncing of divorce upon her whilst she is in the latter situation is not irregular, nor reprobated, any more than whilst in the former. This is contrary to the opinion of *Ziffer*, he considering an unenjoyed wife in the same point of view as one enjoyed:—but our doctors observe that the desire of coition, with respect to an *unenjoyed* woman, is ever fresh, and is not lessened by the circumstance of her courses, so long as the husband's object, (namely, *coition*,) remains unobtained; whereas, with respect to an *enjoyed* wife, desire is renewed upon the *Tobr*.

IF the wife be a person who, from extreme youth or age, is not subject to the courses, and her husband be desirous to repudiate her by three divorces in the regular way, he is first to pronounce a single sentence of divorce upon her, and at the expiration of one month another, and in like manner a third at the expiration of the next succeeding month; because the term of one month corresponds with a return of the courses, as is mentioned in the KORAN.—It is here to be observed that if the first divorce be given in the beginning of the month, the three months from that period are to be counted by the *lunar* calendar, and if in the middle of it, by the number of days, with respect both to the completion of *divorce* and of the *Edit*.—This is the rule with *Haneefa*.—The two disciples maintain that the second and third months are to be invariably counted by the *lunar* calendar, the deficiency of the first month to be taken from the fourth succeeding month, so as to complete it. And it is also to be observed that it is lawful for the husband to divorce this wife immediately after carnal

Mode of adherence to the *Souna* in repudiating a wife not subject to the courses;

nal connexion, without the intervention of any time between the embrace and the divorce.—*Ziffer* says that the husband ought to allow the intervention of a month, because that term corresponds with a return of the courses, and also, because in consequence of the embrace desire becomes languid, and is not renewed until after the lapse of some time.—Our doctors argue that there can be no apprehension of pregnancy with respect to the woman in question; and divorce, after the carnal embrace, in the case of a woman who is subject to the courses, is not reprobated on any other account than as it induces a possibility of pregnancy, which renders the duration of her *Edit* dubious, that of a pregnant woman being determined by her delivery, and, of one not pregnant, by courses: and as to what *Ziffer* alleges, that “desire becomes languid in consequence of the embrace,” it may be replied, that although this be admitted, yet in the present instance desire is greater than in common cases, as the husband can indulge his carnal appetite with such a wife without any apprehension of her producing children, the support of whom might fall upon him; she therefore is an object of desire to him at all times equally, so that this state [of a woman not being subject to the courses] is the same as the state of actual pregnancy; now it is lawful to divorce a *pregnant* wife immediately after carnal connexion with her, because no doubt is induced with respect to the duration of her *Edit*, and the time of pregnancy is a time of desire, as a husband feels desire towards a pregnant wife, either because she produces a child to him, or because the embrace with her does not occasion pregnancy; his desire therefore is not lessened towards such a wife by enjoyment.

or one who is
pregnant.

If a man be desirous of repudiating his pregnant wife by three divorces in the regular way, [that is, according to the *Sonna*,] he is first to pronounce a single sentence of divorce upon her, and at the expiration of one month another, and in the same manner a third at the expiration of the next succeeding month. This is according to *Haneefa* and *Aboo Yoosaf*.—*Mohammed* and *Ziffer* say that the *Talák-al-Sonna*,

al-Sonna, with respect to a *pregnant* woman, consists in giving her a *single divorce* only, because divorce is in itself a dangerous and disapproved procedure; moreover, the only rule instituted by the law in effecting a triplicate divorce is, that the husband first pronounces one divorce, and at the expiration of a month, or the passing of the next courses, another, and in the same manner a third at the expiration of the following month, or the passing of the next succeeding courses; now the courses do not occur to a *pregnant* woman, nor does the lapse of a month stand in place of a return of her courses, (as with a woman whose youth or age prevents her having them,) her whole period of pregnancy being as one long *Tobr*; and hence it follows that it is improper to pronounce more than a single sentence, the rule of the *Sonna* being restrictive to *one* divorce in *one* *Tobr*.—To this *Haneefa* and *Abou Yoosaf* reply that, although divorce be in itself a dangerous and disapproved procedure, yet it is admitted on the ground of *urgency*, and the lapse of a month is the proof of that urgency, and is therefore to be regarded here, the same as in the case of a woman whose youth or age prevents her having the courses: the foundation of this is that the period in question is such a time as affords a renewal of desire to persons in health and vigour, and therefore the act of divorce being proceeded in at such a season affords proof of the urgency of it, with respect to a pregnant woman, the same as to any other: contrary to a woman whose *Tobr* is *long*, [that is, by constitution or accident protracted to any unusual length,] as the lapse of a month is not a proof of necessity with respect to such an one; this proof of necessity being found in her only on the renewal of the *Tobr* after the courses, the recurrence of which, with regard to her, is at all times possible, whereas, with regard to a *pregnant* woman, it is impossible.

IF a man repudiate his wife during her courses, it is valid; because, although divorce within the term of the courses be disapproved, yet it is lawful nevertheless, as the disapproval is not on account of any thing

Case of divorce pronounced during menstruation.

thing essential, but merely because a divorce given during the courses occasions a protraction of the *Edit*.—This kind of disapproval, or interdict, is termed *Nihee-le-ghirehee* *, and does not forbid *legality*, whence a divorce given during the courses is valid; but yet it is laudable that the husband reverse it, as it is recorded that the son of *Omar* having divorced his wife during her courses, the prophet desired *Omar* to *command* his son to take her back again; which tradition shews that divorce during the courses is *valid*, but that reversal is in this case laudable.—This doctrine of the *laudability* of reversal is maintained by many of our modern doctors; but it is certain that, in this case, reversal is not only *laudable*, but *incumbent*, for three reasons; FIRST, in the tradition above quoted, the prophet desires *Omar* positively “to *command* his son,” and *command* is always *injunctive*;—SECONDLY, the pronouncing of divorce during the courses is an *offence*, which it is incumbent upon a man to expiate by every means within his power; and this may be effected, in the present instance, by doing away its consequence, namely, the *Edit*;—THIRDLY, the protraction of the *Edit* is injurious to the woman, wherefore reversal is incumbent, in order that she may not be subjected to injury:—thus it is indispensably incumbent upon the husband to reverse the divorce, when given during the courses; after which, when she has become purified from her courses, and has again had them, he may then either divorce her on the commencement of her second succeeding *Tobr*, or suffer her to remain. The compiler of the *Hedaya* observes that this last is what is said in the *Mabsoot*. *Tehavee* has said that, if the husband chuse, he may regularly divorce his wife on the commencement of the *Tobr* immediately succeeding the courses in which he had given divorce, and reversed it, as above. *Koorokhee* says that what is thus mentioned by *Tehavee* is the doctrine of *Haneefa*. That which is taken from the *Mabsoot* is the opinion of the two disciples; and the ground of it is that the regularity of divorce depends upon the intervention of a complete menstrual discharge between every two

* This may be rendered *prohibition for another reason*.

sentences;

sentences; and the first of these is defective, on account of divorce having been pronounced in the middle of it, so that as part had previously elapsed, whence it would appear necessary to complete it from the next following return; but it is not lawful to have regard to *one* part only of the courses, and not to the *other*; consequently, regard must be had to the next returning courses *in toto*.—The ground of *Tebavee*'s opinion is that the divorce, with its effects, having been annulled entirely by the reversal, it is the same as if no divorce whatever had taken place during the woman's courses; and hence it is perfectly regular to pronounce divorce in the *Tohr* next immediately succeeding.

If a man were to address his wife, saying “ You are divorced “ *thrice*, according to the *Sonna*,”—and he have no particular intention in so doing, then, supposing the wife to be one with whom he has had carnal connexion, and also subject to the courses, she becomes once divorced in that and each of the two succeeding *Tohrs*: and if the husband intended, in so saying, either that *three* divorces should take place collectively upon the instant, or, that a *single* divorce should take effect at the end of each succeeding month, the divorce, in each instance, takes effect according to his intention, whether she be in her courses or her *Tohr* at the period of its thus taking effect upon her.—And if she be one whose *Edit* is calculated by *months*, (such as a woman, for instance, whose courses are stopt through age,) and the husband have no particular intention in thus addressing her, in this case a single divorce takes effect upon the instant, another at the expiration of a month, and a third at the expiration of the next succeeding month; because the term of a month corresponds, in such an one, with the *Tohr* of a woman who is subject to the courses, as was formerly observed; or, if he intended that three divorces should take place collectively upon the instant, the three take place accordingly, in the manner already stated. But if the husband were only to say,

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“ You

“ You are divorced according to the *Sonna*,” omitting the word “ *thrice*,”—in this case the intention of three divorces collectively is not efficient. The proofs and arguments upon this passage are all drawn from the *Arabic*, and derive their weight from certain peculiarities in that idiom.

S E C T I O N.

Of the persons who are competent to pronounce divorce.

THE divorce of every husband is effective, if he be of sound understanding, and mature age; but that of a boy, or a lunatic, or one talking in his sleep, is not effective, for two reasons;—FIRST, because the prophet has said, “ *Every divorce is lawful, excepting that of a boy or a lunatic* ;”—SECONDLY, because a man’s competency to act depends upon his possession of a sound judgment, which is not the case with infants, or lunatics:—and one *talking in his sleep* is the same, in this point, as a boy or a lunatic, since his words in this case are not the result of a deliberate option.

A divorce pronounced by compulsion, is effective.

THE divorce of one acting upon compulsion, from threats, is effective, according to our doctors.—*Shafei* maintains that it is not effective, because a person who is compelled has no option, and no formal act of law is worthy of regard unless it be purely optional: contrary to the case of a *jester*, who, in mentioning divorce, acts from option, which is the cause of its validity.—Our doctors, on the other hand, alledge that the person here mentioned pronounces divorce under circumstances of complete competency, [maturity of age and sanity of intellect,] the result of which is that the divorce takes effect equally with that of a person uncompelled, for with him *necessity* * is the reason of its efficiency; and the same reason applies to the

* Namely, the *necessity* of separation from a wife who may be odious or disagreeable to him.

divorce

divorce of a compelled person, as he is also under necessity of divorce, in order that he may be released from the apprehension of that with which he was threatened by the compeller.—The foundation of this is that the man alluded to has the choice of two evils; one, the thing with which he is threatened or compelled; and the other, divorce upon compulsion; and viewing both, he makes choice of that which appears to him the easiest, namely, divorce; and this proves that he has an option, though he be not desirous that its effect should be established, or, in other words, that divorce should take place upon it; nor does this circumstance forbid the efficiency of his sentence; as in the case of a *jester*; that is to say, if a man pronounce a divorce *in jest*, it takes effect although he be not desirous that it should; and so likewise the divorce of one who is compelled.

IF a man pronounce a divorce whilst he is in a state of inebriety from drinking any fermented liquor, such as *wine*, the divorce takes place. *Koorokbee* and *Tehávee* hold that divorce ought not to take place in this case; and there is also an opinion recorded from *Shafëi* to the same effect. The argument upon which they maintain this doctrine is that reality of intention is connected with the exercise of reason, which is suspended during intoxication from *wine*; in the same manner as where a person has taken any allowed but inebriating medicine, such as *laudanum*, in which case a divorce pronounced would not take effect, and so in this case also. But to this our doctors reply that, in the case now under consideration, the suspension of reason being occasioned by an *offence*, the reason of the speaker is supposed still to remain, whence it is that his sentence of divorce takes effect, in order to deter him from drinking fermented liquors, which are prohibited. But yet if a man were to drink wine to so great a degree as to produce a delirium or inflammation of the brain, thereby suspending his reason, and he in that situation pronounce divorce, it will not take effect.

or in a state
of inebriety,
is valid:

and so, also,
that of a *dumb*
person.

THE divorce of a dumb person is effectual, if it be expressed by positive and intelligible signs, because signs of the dumb are authorized by custom, and are therefore admitted to stand in the place of speech, in the present instance, in order to answer the necessity of him who makes them. The various species of signs used by the dumb in divorce shall be set forth hereafter.

Number of
divorces in
respect to *free*
women and
slaves.

THE utmost number of divorces, with respect to a female slave, is *two*, whether her husband be a slave or free: and the same with respect to a free woman is *three*.—*Shafëi* has said that, in the number of divorces, respect is to be had to the state of the *man*; that is to say, if the husband be free he is empowered to pronounce three divorces, although his wife be a slave; whereas, if he be a slave, he is not authorized to give more than two divorces, although his wife should be a free woman, the prophet having said “*In divorce the state of the*”
“*HUSBAND is to be regarded, and in EDIT that of the WIFE:*”—moreover, personal consequence is an essential circumstance in all points of authority, and that appertains to a freeman in a higher degree than to a slave, whence his authority is most extensive.—The arguments of our doctors are twofold upon this topic;—FIRST, a precept of the prophet, declaring, “*The divorces of a female slave are*”
“*TWO, and her EDIT is TWO courses*”;—SECONDLY, it is the *woman* who is the subject of *legality*, and this legality entitles her to benefits; but slavery entitles only to half of these benefits; hence it follows that the divorce of a female slave should not exceed *one and a half*, but such subdivision of it being impossible, her divorces extend to *two*.—As to the saying of the prophet quoted by *Shafëi*, that “*in divorce*”
“*the state of the husband is to be regarded,*” it means no more than that the efficiency of divorce proceeds from him.

A master
cannot di-
vorce the wife
of his slave.

THE divorce of a slave upon his wife takes place; but that of a master upon the wife of his slave is of no effect, because the matrimonial propriety being a right of the slave, the relinquishment of it rests with the *slave*, not with his *master*.

CHAP.

CHAP. II.

Of the *Execution of Divorce.*

DIVORCE (in respect to the execution of it) is of two kinds; *Sareeh* Distinctions.
or *expres*s, and *Kináyat*, or *by implication*:—and first of *expres*s
divorce.

TALÂK SAREEH, or *expres*s divorce, is where a husband delivers the sentence in direct and simple terms, as if he were to say “ I have “ divorced you,” or “ you are divorced,” which effects a *Talak Rijai*, or *divorce reversible*,—that is to say, a divorce such as leaves it in the husband’s power lawfully to take back his wife at any time before the expiration of the *Edit*: and these forms are termed *Sareeh*, or *expres*s, as not being used in any sense but divorce; and it appears in the sacred writings that reversal after an *expres*s divorce is lawful.—The *intention* is not a condition of divorce taking place from these forms, for the same reason as was already assigned, to wit, because they directly *expres*s divorce, as not being used in any other sense.—And it is to be observed that a *reversible* divorce only is effected by these forms, although the intention of the husband be a *complete* divorce, because his intention is here to effect that upon the instant which the law suspends upon the lapse of the *Edit*, and is therefore unworthy of regard: and if his intention should be merely to *expres*s a *delivery from bondage*, (which the term *Talâk* is occasionally used to imply,) and he make a declaration to this effect before the *Kázee*, it is not admitted, as it disagrees with his apparent design:
but

The manner
of *expres*s
divorce.

but yet it is admitted before God, because he intended in those words a meaning which they are capable of bearing: and if his intention be to express *a release from bodily labours*, his declaration to this effect is not at all admitted, either before the *Kazee*, or before God, as the word *Talâk* does not bear the construction of release with respect to *bodily labour*, although it may occasionally bear that construction with respect to *bondage*: and it is also to be remarked that no more than a single divorce can be effected by these forms, although the intention be more.—*Shafei* alledges that divorce takes place according to whatever the intention may be.—The proofs on each side are drawn from the *Arabic*.

Different formulas of express divorce.

IF a man may say to his wife “You are [under] divorce,” or “You are divorced by divorce,” or, “You are divorced according to divorce*,” without any particular intention, or intending thereby *one* divorce, or *two* divorces, a single divorce reverfible takes place; and if his intention be three divorces, a triple divorce takes place accordingly.—The proofs are drawn on this occasion from the *Arabic*.

IF a man were to say to his wife (as above) “You are divorced by divorcement,” and declare that by the word “*divorced*” he meant *one* divorce, and by the word “*divorcement*” a *second* divorce, his declaration is credited, because each of these words are capable of being construed into an intention of effecting divorce, and hence two reverfible divorces take place, provided the woman has been enjoyed by him.

* These and the succeeding forms of divorce, literally rendered, are most of them apparently unintelligible, or absurd: they are each, however, to be considered as having some peculiar *force* or *effect*, which it is impossible to express, or to convey an idea of, in translation.

IF

IF a man apply divorce to the whole woman, by saying (for instance) “You are divorced,” in this case divorce takes place, on account of its application to its proper subject, namely, the woman, the relative “*You*” implying the woman’s person *in toto*: and the rule is the same where he applies it to any particular part or member, from which the whole person is necessarily understood, as if he were to say, “your *neck*,” or “your *trunk*,” or “your *head*,” or “your *body*,” or “your *vulva*,”—“is divorced,”—for by such words the whole person is implied, the terms *trunk* and *body* bearing that sense evidently, and the others in common use; and they moreover occur, both in the *traditions*, and also in the *Koran*; and, according to one tradition, the term *blood* may also be used in the same sense. Divorce takes place also where it is applied to any general portion of the wife, as if the husband were to say to her “your *half*,” or “your *third*,” is “divorced,”—because any general portion is a proper subject of all acts, such as *sale*, *purchase*, and so forth, and is therefore equally so of divorce; but the subject in question (to wit, the woman) is incapable of division, and hence divorce is established upon her *in toto*, and is not restricted to the portion mentioned.

IF the husband say to his wife “your *hand*,” or “your *foot*,” is “divorced,” divorce does not take place.—*Ziffer* and *Shafeï* maintain that it does: and the same difference of opinion subsists where the divorce is applied to any other specific member, or organ, such as does not imply the whole person, as the *ear* or the *nose*, &c.—The argument of *Ziffer* and *Shafeï* is, that those members contribute to the matrimonial enjoyments, such as kissing, touching, and so forth, and whatever is of this description, as being a subject of the laws of marriage, is a proper subject of divorce, and as such, when divorce is applied to it, it takes place upon it, and consequently extends to the whole person, in the same manner as where it is applied to any general portion, such as an *half*, and so forth: contrary to the application of marriage, to any specific member, such as the *hand* or the *foot*, in which case

Divorce, when applied to any specific part or member of the body, such as does not (in common use) imply the whole person, is of no effect.

the marriage is not valid, because it is not conceivable that legality should be established in that particular member, and extend, in consequence, to the whole person, as the illegality existing in the other members exceeds the legality in that particular member,—whereas the reverse holds in divorce.—To this our doctors reply, that a specific member, such as the *hand* or *foot*, not being in itself a proper subject of divorce, the application of that to it is null, the same as to a woman's *spittle*, or to her *nails*, the ground of which is that the subject of divorce must be something upon which a bond or connexion may exist, (as divorce implies the dissolution of a bond or connexion,) and there is no bond upon the *hand*; for which reason it is that the application of marriage to that part is invalid: contrary to a general portion of the body, which being (with our doctors) a proper subject of marriage, the application of that to it is valid, and it is consequently a proper subject of divorce also. There is a similar difference of opinion where the divorce is applied to the *belly* or the *back*: but it is evident that here divorce does not take place, as these parts are never used to imply the whole person.

A partial divorce is complete in its effect.

If a man pronounce upon his wife an *half* divorce, one divorce takes place, because divorce is not capable of division, and the mention of any portion of a thing of an indivisible nature stands as a mention of the whole: and the *fourth*, or *fifth*, or any other proportion of divorce, is analogous to the *half*, in what is now said, for the same reason.

Equivocal

If a husband say to his wife “you are under three moieties of two divorces,” three divorces take place, because the half of *two* is *one*, and consequently *three* moieties of *two* divorces amount to *three*.—And if he were to say “you are under three moieties of one divorce,” some are of opinion that two divorces take place, this amounting to one and a half; but others alledge that it produces three divorces, because every moiety, amounts to one complete divorce, on the

the principle already stated: various doctors agree in approving the former opinion.

If a man say to his wife “you are under divorce, from *one* to “*two*,” or “between *one* and *two*,” in this case *one* divorce takes place; and if he were to say,—“from *one* to *three*,” or “between “*one* and *three*,” two divorces take place.—This is the doctrine of *Haneefa*.—The two disciples assert that by the first form *two* divorces take place, and by the last *three*.—*Ziffer*, on the other hand, maintains that by the first form *no* divorce takes place, and by the second *one* divorce only, this being conformable to analogy, because the boundaries of a thing are not included in the contents; as for example, where a man says “I have sold such a piece of ground, from *this* “wall to *that* wall,” in which case neither wall is included in the sale.—The ground of opinion of the two disciples is that, in such a mode of speaking, the *whole* is by custom understood, as for example, where one man says to another, “take, of my property, from “one *Dirm* to an *hundred*,” which implies the whole hundred.”—The argument of *Haneefa* is that, in this indefinite mode of expression, no particular number is implied, any more than where a man, in discourse, says “my age is from sixty to seventy years,” or “between “sixty and seventy,” by which he means some indefinite term between these two: and in reply to the argument of the two disciples, it is sufficient to observe that the whole is to be understood only where the expression relates to a thing of an indifferent nature, as in the instance cited by them; but divorce is in itself a dangerous and disapproved procedure: and to what is advanced by *Ziffer* it may be answered, that it is necessary that the *first* boundary be in existence, so as that the *second* may bear a relation to it; but in the present case the *first* boundary (to wit, *divorce*,) is not in being, nor can be so, unless by divorce taking place, which it accordingly does of this necessity: contrary to the case of sale, cited by *Ziffer* as apposite to this, because *there* both boundaries (understood by the two walls)

and indefinite forms.

do actually exist previous to the sale.—It is to be observed on this occasion, that if the husband, speaking in the second form, intend only a single divorce, it is admitted with God, as he may be allowed to intend whatever construction the words will bear, but it is not admitted with the magistrate, as being contrary to apparent circumstances.

If a man say to his wife “you are divorced once by twice,” intending the multiple or multiplied product thereof, or not having any particular intention, a single divorce reversible takes place.—*Ziffer* says that two divorces take place, such being the number understood from this mode of speaking in arithmetic; and this opinion is adopted by *Háfn-Bin-Zeeád*.—But if, in speaking as above, he intend to say “you are divorced once and twice,” three divorces take place accordingly, because this way of speaking is capable of that construction, as the word *fee* [by] has also [in the *Arabic*] the sense of *and*: if, however, the woman be unenjoyed, no more than one divorce takes place, as in the case where a man says to his unenjoyed wife “you are divorced once and twice;”—but if he intend to say, “you are divorced once *with* twice,” three divorces take place, although she should be unenjoyed;—and if he mean to express himself in a sense which implies that the one is contained in the other, as if he were to say, “you are divorced once *in* twice,” one divorce takes place, the super-added words *in twice* being held to be redundant, because divorce is incapable of being a container*.

If a husband say to his wife “you are divorced *twice* by *twice*,” intending the multiple, yet no more than *two* divorces take place.—

* The words in the original are “Ante Taliktoon wahdetoon *fee* Sinnatinee,” which is an indefinite or equivocal mode of expression, as the word *fee* (among various other senses) bears those of *by*, *with*, or *and*, as well as *in*,—which accounts for the distinctions here made, and the latitude permitted.

With *Ziffer* three divorces take place, because from this *multiplying* mode of expression is to be understood *four* divorces, and three consequently take place, as being the greatest lawful number.

If a man say to his wife, “you are divorced from this place to *Syria*, a single divorce reverfible takes place.—*Ziffer* fays that it occasions a complete or irreverfible divorce, because, where he thus gives the divorce a description of *length*, it is the fame as if he were to fay, “you are under a *long* divorce,” and if he were to fay fo, a complete divorce would take place, and confequently the fame in the prefent inftance.—Our doctors, on the other hand, alledge that the fentence does not affix any description of *length* to the divorce, but rather the reverfe, because when divorce takes effect in any *one* place it does fo in *all*.

Divorce, with
a reference to
place.

If a man were to fay, “you are under divorce in *Mecca*,” divorce takes place upon her immediately in every country; and fo alfo if he were to fay “you are divorced *in this houfe*,” because divorce is not refticted to any particular place;—and if he were to intend, by thus fpeaking, that “fhe fhall become divorced *if ever fhe fhould enter Mecca*, or that houfe,” his declaration to this effect is admitted with God, but not with the *Cawzee*, as the tenor of his words apparently contradict this conftruction.

If a man fay to his wife, “you are under divorce when you enter “*Mecca*,” in this cafe no divorce takes place until fhe enter *Mecca*, he having fufpended the divorce upon that circumftance.—And if he fay, “you are divorced in entering the houfe,” this means “if you enter “the houfe,” because the containing particle frequently ftands expreffive of a condition, and not being applicable here in its *containing* fenfe, it neceffarily affumes the meaning of a *condition*.

S E C T I O N.

Of Divorce with a Reference to Time.

IF a man say to his wife, “you are divorced this day to-morrow,” or “you are divorced to-morrow this day,” in the first instance divorce takes place on the instant, and, in the second, on the beginning of the morrow; and the second word is in both cases redundant; because, where he first says “this day,” divorce takes place immediately on the *present day*, and consequently is not procrastinated to the morrow,—and, on the other hand, where he first says “to-morrow,” the divorce is procrastinated to the *morrow*, and does not take place immediately on the present day; the second word is therefore redundant in both cases.

WHERE a man says to his wife, “you are divorced *to-morrow*,” the divorce takes place on the dawn of the next morning; and if he should intend by the word “to-morrow” the *end* of the morrow, it is so admitted with God, but not with the *Kâzee*, because this contradicts appearances: but if he were to say “you are divorced *in* to-morrow,” declaring his intention therein to be “at the *end* of the *morrow*,” it is admitted with the *Kâzee*, according to *Haneefa*. The two disciples say that it is not admitted with the *Kâzee*, although it be so with God, because the words *to-morrow* and *in to-morrow* are one and the same thing, as the word *to-morrow* is mentioned in an *inclusive* sense* in both cases, whence it is that, from the expression “in to-morrow,” divorce takes place on the first instant of the en-

* This is an *Arabic* mode of expression, implying no more than that here the particle *in* is understood.

fuſing day, where the huſband has no particular intention.—The argument of *Haneefa* on this ſubject is that the huſband may be allowed to have intended ſome ſuch meaning from his expreſſion, becauſe the word *in* is introduced as a *Zirf*, or particle of containance, which does not require that the *whole* of the container ſhould be underſtood from it; and the reaſon why divorce takes place, in the preſent inſtance, from the beginning of the enſuing day, where the huſband had *no* particular intention, is, that as nothing appears to the contrary, its commencement is neceſſarily determined to that period; and regard being thus had to neceſſity in the determination of it, it follows that if the ſpeaker fix it at the *end* of the day, this determination muſt be regarded, *a fortiori*: contrary to his ſaying, “ you are under divorce to-morrow,” (omitting the word *in*,) in which caſe, if he ſhould have intended the *end* of to-morrow, his declaration to that effect is not admitted with the *Kázee*, becauſe the word *to-morrow*, without *in*, occasions the woman to fall under the deſcription of being divorced for the *whole* of to-morrow, which cannot be effected but by the divorce taking place upon her in the beginning of the day; and conſequently the end of the day, in this caſe, contradicts appearances.

If a man ſay to his wife “ you are under divorce yeſterday,” and it ſhould ſo be that he was married as *this* day, divorce does not take place at all, becauſe he has here referred divorce to a period in which he was not competent to pronounce it, and therefore his divorce is nugatory, the ſame as if he were to ſay, “ you are under divorce *before my exiſtence*.”—But, in the preſent caſe, if he had married her *before* the time of which he ſpeaks, divorce takes place at the time of his ſpeaking; becauſe, if a man ſignify a divorce in the *preterite* form, it is an indication in the *preſent*, and hence the divorce takes place accordingly, this expreſſion being an indication of what is *now*, and not a relation of what is *paſt*, as it does not appear that he pronounced

nounced any divorce yesterday, so as that he should now give intelligence thereof*.

If a man say to his wife “you are under divorce previous to your marriage with me,”—divorce does not take place, because he applies the divorce to a period which forbids it, the same as if he were to say “you are under divorce in my infancy,” or “in my sleep.”

If a man say to his wife, “you are under divorce *upon* my not divorcing you,” or “*when* I do not divorce you,” and then remain silent, divorce takes place, because he has here applied it to a time which appears the moment he ceases to speak.—But, if he were to say, “you are under divorce *if* I do not divorce you,” divorce does not take place until near the period of his decease, because here the condition does not become established until life be despaired of.

If a man say to his wife “you are divorced, whilst I do not divorce you, you are divorced †,” she becomes divorced on account of the last repudiation, to wit, “you are divorced.”—This is where the last words of the sentence are uninterruptedly connected with the first part of it, and proceeds upon a favourable construction, for analogy would suggest that the first divorce takes place also, (to wit, “you are divorced whilst I do not divorce you,”) and thus both divorces would take place, provided the woman be enjoyed; and such is the opinion of *Ziffer*; but the reason for the more favourable construction here, is that it is the intention of the vower to fulfil

* The reasoning here turns solely upon certain idiomatical peculiarities in the construction of the *Arabic* language, in which the preterite is frequently adopted, by the law, in a *creative* sense. (See Book II. Chap. I.)

† This is one of the forms under which divorce *by vow* is conceived.

his vow, in such a manner that he may not be forsworn, which is impossible in the present case, unless that portion of time which may enable him to pronounce the divorce be excepted from his speech, “you are divorced whilst I do not divorce you;” and being thus excepted, divorce takes place, on account of the words which follow. Cases correspondent to this occur in the Book of *Eimán*.

If a man say to a strange woman, “you are under divorce the day upon which I marry you,” and he afterwards marry her in the night, she is divorced; because by *day* is sometimes meant the *day time*, and this sense alone it bears where it relates to a matter of continuance, (such as *fasting*, for instance,) and sometimes it is meant to express *time* in general, which sense it bears where it relates to a *transient* or *momentary* transaction, and of this nature is the act of *divorce*; and consequently by the word *day*, in the present case, is to be understood *time generally*, applying equally to *day* and *night* both.—But if the husband were to say that by *day* he meant the *daytime*, and not *time generally*, his declaration is admitted with the *Kázee*, as he may be allowed to have intended that construction which is applicable to the word *day*, since, according to custom, *day* applies to the *daylight*, and *night* to *darkness*.

S E C T I O N.

If a husband say to his wife “I am divorced from you,” by this nothing is established, although divorce be the intention: but if he were to say “I am *separated* from you,” or “I am *prohibited* to you,” intending divorce, she becomes divorced.—*Shaféi* holds that divorce takes place in the former instance also, where such is the intention,

tention, because the matrimonial right of possession is equally participated by the husband and the wife, infomuch that the latter is entitled to demand coition of the former, and the former to demand admission to coition from the latter, and the legality of the carnal enjoyment also appertains equally to both; and divorce being used for the purpose of dissolving the right, and the legality, the application of it to the husband holds good, as well as to the wife, and consequently divorce takes place under the *first* of the above forms, as well as under the *second* or *third*.—The argument of our doctors is that divorce is used for the *removal of restraint*, and this is found in the woman, but not in the man, (whence it is that a married woman cannot go out of the house:) and admitting that divorce were used for the purpose of dissolving the matrimonial right of possession, (as advanced by *Shafëi*,) it may be replied that the husband is the possessor of the wife, and the wife the possessed of the husband, (whence the woman is called the *married*, and the man the *marrier*,) and consequently possession applies to the woman: contrary to *separation* or *prohibition*, the *first* of these being a total dissolution of *connexion*, and the *second* of *legality*, both of which equally appertain to each of the parties; and hence the application of them to either is equally forcible, whereas that of divorce is of no force except when applied to the wife.

If a man say to his wife, “you are divorced once or not,” divorce does not take place. The compiler of the *Hedäya* observes that the same is said in the *Jama-Sagheer*; nor is any difference of opinion recorded there. This is what is said by *Haneefa*, and in one place by *Abou Yoosaf*. According to *Mohammed* (with whom *Abou Yoosaf* in another place coincides) a single divorce reversible takes place; and in the book of divorce in the *Mabsoot* it is recorded that, where the husband says to his wife, “you are divorced once or no-thing,” a single divorce reversible takes place, according to *Mohammed*: now between this and the preceding form there is no sort of difference, and consequently, if the case cited in the *Jama-Sagheer* be

be the opinion of *all* the doctors, it follows that there are *two* opinions recorded from *Mohammed* upon this point.—The argument of the latter is that the number is rendered dubious on account of the particle of doubt “*or*” intervening between the word “*once*” and the negative “*not*,” wherefore regard to the former drops, and his words remain, “*you are divorced*,” contrary to a case where he says “*you are divorced or not*,” in which instance divorce does not take place, since in this last case the doubt exists with respect to divorce itself.—The arguments of *Haneefa* are drawn from the *Arabic* idiom.

If a man say to his wife “*you are divorced after my death*,” or “*after your death*,” no consequence whatever ensues from this expression, because, in the first instance, he has applied the divorce to a time which forbids it, since a husband is not competent to the execution of divorce after death; and, in the second, the woman no longer remains a fit subject of it; and both these circumstances are essential to a legal divorce.

If a husband become the proprietor of his wife [as a slave] either *wholly* or in *part*, or a wife the proprietor of her husband, separation takes place between them, possession by bondage and possession by matrimony being irreconcilable;—in the *latter* instance, because, if separation were not to take place, it would follow that the wife is at once the *possessor* and the *possessed*, (she falling under the latter description by virtue of marriage;)—and, in the *former* instance, because possession by matrimony is established of necessity, and when the husband becomes actual possessor of his wife’s person, this necessity ceases, and consequently possession by matrimony also.

Separation takes place upon either party becoming possessed of the other as a slave:

If a man purchase his own wife, [as a slave,] and afterwards divorce her, divorce does not take place, because without the continuance of marriage it cannot exist, and in the present case the marriage has

or, upon a husband purchasing his wife.

ceased in every shape whatever, since it does not continue even with respect to *Edit*; and in the same manner, when a wife becomes possessor of her husband, either *wholly* or in *part*, if the latter were to divorce her, his divorce does not take effect, because in this case also the marriage has ceased, for the reasons before assigned.—*Mohammed* says that in the latter case divorce holds good, because the woman is enjoined an *Edit*, and hence the marriage continues in one shape: contrary to a case where the husband purchases his wife, for then the marriage totally ceases, because she is not under any obligation of *Edit* with respect to her husband, who is now her proprietor, and has a right to continue carnal cohabitation with her in that capacity.

The divorce of a wife (being a slave,) when suspended upon the emancipation of her owner, takes place upon the occurrence of the condition.

If a man marry the female slave of another, and say to her, “you are divorced twice upon the manumission of your owner,” and her owner afterwards emancipate her, the divorce takes place; but it is still in the husband’s power to reverse it, because he has suspended the divorce upon the manumission of the master, and that is the condition of it, (as a condition is a thing not existing *at present*, but the occurrence of which is probable, and in this case actually takes place on manumission, wherefore that is the condition, and divorce is suspended upon it;) and divorce taking place after the occurrence of the condition, it follows that it takes place upon her as a *free woman*, and hence she is not, by *two* divorces, rendered prohibited * by a *rigorous prohibition*.

If the person in question were to say to the female slave, his wife, “when to-morrow arrives you are under two divorces,” and her owner were to say, “when to-morrow arrives you are *free*,” in this case it is not lawful for the husband to marry her again, until such

* Three divorces being the utmost number to a free woman, and two to a slave, it follows that if two divorces take place upon a woman as a *slave* she becomes *irreversibly* divorced. (See Chap. I.)

time as she has been married to another man, and repudiated by him, and her *Edit* (which is three terms of her courses) has elapsed.—This is the doctrine of the two *Elders*.—*Mohammed* says that the husband is at liberty to reverse the divorce, since the execution of the divorce is connected with the master's manumission, because the husband has suspended his repudiation upon the same circumstance on which the master has suspended his manumission; hence the *repudiation* is (as it were) associated with the *emancipation*; and freedom being also associated with the emancipation, it follows that the execution of divorce is, of course, associated with freedom, and the divorce takes place upon the slave after freedom, (whence it is that the *Edit* of the woman here treated of is fixed at *three* terms of her courses, whereas, if she were a *slave*, her *Edit* would be *two* terms only,) and such being the case, reversal is approved, in this, as well as in the preceding, example. The argument of the two *Elders* is that the husband has suspended *divorce* on the same circumstance upon which the master has suspended *freedom*; and as that takes place upon the woman whilst she is yet a slave, so does divorce likewise; now the slave becomes forbidden, [in marriage to her husband,] in consequence of two divorces, by the *rigorous prohibition*, wherefore reversal is not approved; nor does it become lawful to him to marry her till such time as she shall have been possessed by another husband; but this reason does not apply to the *Edit*, since that is a matter of caution, which is evident from fixing its duration to *three* terms of the courses, so as that the complete fulfilment of it may be indubitable: and with respect to what *Mohammed* says, that, “as repudiation is connected with freedom, divorce takes place “*after freedom*,” it is of no weight, because, if freedom be connected with manumission, on account of the one being the cause of the other, and if the repudiation and manumission be associated together in such a manner that repudiation and freedom must take place at the same time, we reply that divorce is also associated with repudiation, on account of the *latter* being the cause of the *former*; whence it follows, that freedom is associated with divorce, and not that divorce takes place subsequent to freedom.

S E C T I O N.

Of DIVORCE by Comparison, and the several Descriptions of it.

The number
of divorces
may be de-
termined by
signs made
with the
fingers;

IF a man say to his wife, “you are under divorce *thus*,” holding up his thumb and fore and middle finger, three divorces take place, because, from the holding up of the fingers number is customarily understood, where the sign is associated with a relative to number; and the word “*thus*” is of this kind; and the fingers held up are three in number; whence three divorces are to be understood:—and if the sign be given with *one* finger, a single divorce takes place: if with *two* fingers, *two* divorces.—It is to be observed that the sign is to be understood from the fingers which are *extended*, and not from those which are *clenched*. Some of our modern doctors, however, say that, if it be made with the *back* of the fingers, it is understood from those which are *clenched*.—And if the divorcer were to say “I have given the signal with the two clenched fingers,” whilst at the same time he had actually given it with the *extended* fingers, his declaration is credited with God, but not with the *Kâzee*; and so also where he says “I have intended the signal by the *palm* of my hand, and *not* by the *fingers*,” inasmuch that two divorces take place in the *first* instance, and one in the *last*, in a religious view; because signs are made with the shut fingers, or the palm of the hand, as well as with the extended fingers, and hence he may be allowed to have intended to express the number of divorce by signs capable of that construction: but it contradicts appearances. And in the case now under consideration, if the word “*thus*” be omitted, and the sign be made with the thumb and fore and middle finger, yet one divorce only takes place, because the *sign* is not associated with the *relative*, and hence the

but not unless
it be expressed
with a rela-
tion to num-
ber.

the *words* only remain, to wit, “you are divorced,” from which one divorce only results.

IF a man give to the divorce which he is pronouncing a description of particular *vehemence* or *amplification*, as if he were to say, “you are divorced *irreversibly*,” or “you are divorced *to a certainty*,” an irreversible divorce takes place, whether the wife whom he so addresses may have been enjoyed or not.—*Shafei* says that the divorce is reversible where she has been enjoyed, because reversal during *Edit*, after divorce from a wife already enjoyed, is sanctioned by the precepts of the law, and bringing it under the description of *irreversibility* is contrary to them; thus a husband is not at liberty to pronounce, upon an *unenjoyed* wife, a divorce irreversible; the word “*irreversibly*,” therefore, is nugatory on this occasion, as much as if he were to say “you are divorced, with this condition, that no right of reversal remains to me.”—The argument of our doctors on this point is, that the man has pronounced the divorce under a description which it is capable of bearing, because divorce takes place irreversibly upon a wife *unenjoyed*, (and also upon any other, at the expiration of the *Edit*;) and such being the case, the divorce takes place in this case irreversibly upon an *enjoyed* wife, the same as upon one *unenjoyed*, the husband having, by his description, specified a circumstance which is really applicable to divorce. And with respect to the case of reversal being mentioned as an *additional condition*, (as cited by *Shafei* in support of his doctrine,) it is not admitted; because there also a divorce irreversible takes place, where it is pronounced either *without* intention, or with the intention of *two divorces*; but where three divorces are intended, that number must take place, as irreversibility bears the construction of three divorces.

Divorce pronounced with an expression of vehemence is irreversible in its effect.

IF a man say to his wife “you are divorced *irreversibly*,” or “you are divorced *to a certainty*,” and intend by his words “you are divorced” to express *one* divorce, and by the additional words “*irreversibly*,”

“irreversibly,” or “to a *certainty*,” *another* divorce, two divorces irreversible take place, as these expressions are of themselves capable of effecting divorce.

If a husband say to his wife “you are under a *most enormous* divorce,” a divorce irreversible takes place, because divorce is thus described only with a view to its effect in the immediate dissolution of the marriage, and hence the description of it by *enormity* is the same as by *irreversibility*. And it is the same if he were to say, “A *most base* divorce,” or “*the worst kind* of divorce:” and so also, if he were to say, “a *diabolical* divorce,” or “an *irregular* divorce:” because reversible divorce is restricted to those of the *regular* description, [or *Taldk-al-Sonna*,] and consequently all others are of an irreversible nature.—It is recorded as an opinion of *Abou Yoosaf*, that, where the husband says “an irregular divorce,” a divorce irreversible does not follow, unless such be the intention, because irregularity [*Biddât*] in divorce is of two kinds,—*one* originating in the circumstance under which divorce is executed, (as where it is pronounced upon the wife during her courses,)—the *other*, in the nature of the sentence, (as where the husband pronounces the divorce irreversible in direct terms,) and hence it is indispensably requisite that the intention be regarded. It is also recorded as an opinion of *Mohammed*, that from the use of the descriptions *irregular* or *diabolical* a divorce reversible takes place, as divorce may be thus described, *not* with any view to *irreversibility*, but merely to the *irregularity* of the circumstances under which it is pronounced, (as where it is pronounced upon the woman during her courses;) and hence the divorce is not irreversible, unless such be the intention.

If a man say to his wife “you are under a divorce *like a mountain*,” a divorce irreversible takes place, according to *Haneefa* and *Mohammed*.—*Abou Yoosaf* holds that the divorce is reversible, because a *mountain* is a single thing, and hence the comparison of divorce with
a mountain

a mountain gives the former a description of *unity*.—The argument of the other two fages is, that *simile*, in divorce, is always used in an *amplifying* sense; and *amplification* implies *irreversibility*; whence a divorce irreversible is the effect.

If a man say to his wife “you are under a *most vehement* divorce,” or “you are divorced like a *thousand*,” or “a *houseful*,—one divorce irreversible takes place, unless his intention be three divorces, in which case three take place accordingly.—The divorce is irreversible from the first of these forms, because it is there mentioned under a description of *vehemence*, which occasions irreversibility, as applying something in its nature decisive, and incapable of recall,—whereas, divorce reversible is capable of recall, and therefore the description of *vehement* does not apply to it; and it is irreversible from the *second* form, because this simile sometimes expresses *force*; and sometimes *number*, (as it is said, for instance, that such a man is like a *thousand*,—by which it is to be understood that he is possessed of *uncommon strength*,) and hence the intention applies with equal propriety to either sense; and where no intention exists, the least extensive meaning of the two is adopted, to wit, *one divorce irreversible*;—and from the *third* form, because a house may be filled either by the *magnitude* of its contents, or by the *number*, and hence the intention applies with equal propriety to either circumstance; and where no intention exists the least extensive sense is adopted, as above.

It is a rule, with *Haneefa*, that whenever divorce is thus pronounced with a *simile*, it produces a divorce irreversible, whatever the thing may be with which it is compared, and whether the magnitude of that thing be mentioned or not; it having been before remarked that simile in divorce is always used in an *amplifying* sense; and amplification implies irreversibility. *Abou Yoosaf*, on the other hand, holds, that if the *magnitude* of the subject of simile be mentioned, the divorce is irreversible, but not otherwise, whatever that may be, because

Divorce, when pronounced with a *simile*, is always irreversible.

cause a simile may sometimes be introduced merely to express *unity*; wherefore indefinite comparison is not to be taken in an amplifying sense: but where the *magnitude* is mentioned, *that* undoubtedly is to be construed *amplification*; and hence irreversibility is established.—Again, *Ziffer* maintains that if the subject of simile be of such a nature as conveys an idea of magnitude, the divorce is irreversible, but otherwise not.—Some commentators alledge that *Mohammed* coincides with *Haneefa* on this point: others, that he agrees with *Abou Yoosaf*.—The nature of these diversities of opinion is exemplified in a case where a man says to his wife “you are under a divorce like a needle’s eye,” or “like the *size* of a needle’s eye,” or “like a mountain,” or “like the *size* of a mountain;” for under the *first* of these forms the divorce is held to be irreversible by *Haneefa* alone; under the *second* it is so with *Haneefa* and *Abou Yoosaf*, and not with *Ziffer*;—and under the *third* it is so with *Haneefa* and *Ziffer*, and not with *Abou Yoosaf*; but under the *fourth* form it is irreversible with them all.

If a man say to his wife “you are repudiated by a *heavy* divorce,” or “by a *broad*,” or “by a *long* divorce,” one divorce irreversible takes place; because a thing of which the reparation is *impracticable* is called *heavy*, and an irreversible divorce is of this kind, inasmuch as the reparation of it is difficult; and with respect to those things of which the reparation is difficult, it is common to say “they are *long*” “and *broad*.”—It is recorded from *Abou Yoosaf* that the divorce thus occasioned is reversible, because the descriptions of *difficulty*, *length*, or *breadth*, do not apply to divorce, and are therefore nugatory.—And if the man should, by any of these sentences, intend *three* divorces, it is approved, because separation is divided into two kinds, the *light* and *heavy*, so that when the *heavy* (which is three divorces) is particularly specified, it is held to be efficient.

S E C T I O N.

Of DIVORCE *before* COHABITATION*.

WHEN a man divorces a woman before cohabitation, by saying to her “you are divorced thrice,” three divorces take place upon her, because he has here given three collectively; but if he pronounce the three separately, saying “you are divorced,—divorced,—divorced,” one divorce irreverfible takes place from the *first*, but nothing from the *second* or *third*, because each repetition of the word “*divorced*” is a feparate *execution* of divorce; and the first of them having already rendered the woman *decifively* and *irreverfibly* divorced, it follows that the fecond and third cannot take effect upon her.—And it is the fame where he fays, “you are divorced *once* and again,” (where a fingle divorce takes place,) because the woman becomes completely divorced by the first part of the fentence.

Three divorces take place upon an unenjoyed wife when they are pronounced together, but only the *first* when they are pronounced *feparately*.

If a man fay to his unenjoyed wife, “you are divorced *once*,” and the woman fhould happen to die before the word *once* be pronounced, in this cafe divorce does not take place, because he has here affociated the number with the divorce, which confequently ought to take place accordingly; but the woman dying before the number is mentioned, no fubject of divorce remains at the time when it fhould take place, and hence the execution of it is null: and fo alfo, where he fays, “you are divorced *twice*” or “*thrice*.”

* Divorce pronounced upon a woman *before* cohabitation is in all cafes complete and irreverfible. An attention to this rule is neceffary to the underftanding of feveral cafes in this fection.

If a man say to his unenjoyed wife, “you are divorced *once* before *once*,” or “*once*, and, after that, *again*,” a single divorce takes place; but if he were to say, “you are divorced *once*, and previous thereto *once*,” two divorces take place; and so also if he were to say “you are divorced *once* after *once*.”—The proofs are all drawn, in this case, from the *Arabic* idiom.—And if the man say “you are divorced once with once,” or “once along with once,” two divorces take place, because of the associating particle *with*, which makes the sentence appear as of two divorces collectively.—*Abou Yoosaf* says that, under the second form, one divorce only takes place: his proof is drawn from the *Arabic* idiom.—In all these instances it is to be remarked that two divorces would take place upon an enjoyed wife.

If a man say to his unenjoyed wife, “if you enter the house you are divorced once and again,” and she afterwards enter the house, a single divorce only takes place upon her, according to *Haneefa*:—The two disciples say that two divorces take place.—But if he were to say, “you are divorced *once* and *again*, if you enter the house,” and she afterwards enter it, two divorces take place upon her, according to all.—And if he declare the same sentence, with a variation in the construction of it, thus, “you are divorced once,—and again “if you enter the house,”—*Koorokbee* has said that here also there is a difference of opinion, one divorce only taking place with *Haneefa*, and two with the two disciples:—*Abou Lays*, however, observes that here one divorce only takes place, according to all the doctors, as under this construction the *last* member of the sentence is utterly distinct and separate from the *first*, and this is approved.

In implied
divorce

THE *second* kind of divorce, namely *Talak-Kinayat*, or divorce by *implication*, is where a man repudiates his wife (not in *express* terms

terms but) by the mention of something from which divorce is understood; and divorce does not take place from this but by *intention* or *circumstantial proof*, because the implication is not used to express *divorce* alone, since it may mean divorce, and also something else, and hence *intention* or *circumstantial proof* are requisite to determine the construction in which it is to be taken.

THE compiler of the *Hedaya* observes that implication is of two kinds.—The FIRST is that from which a single divorce reversible takes place; and this consists of three forms of words,—to wit, “Count!”—“Seek the purification of your womb!”—“You are single!”—of the FIRST, because to *count* means *enumeration*, and hence the word “*count!*” bears two constructions, one, “count! (the courses that are incumbent upon you;”) and the other, “count! (the blessings of Almighty God;”) and if the speaker intend the former meaning, divorce is the ascertained construction of the word, in virtue of such his intention; and here the divorce takes place, of necessity, from his having desired her to count her courses; which order is of no force except where he has divorced her, because previous to the divorce, the counting of her courses was not incumbent upon her, and hence it is the same as if he had said, “you are divorced, “and count!” and as this necessity is sufficiently answered by a reversible divorce, a reversible divorce accordingly takes place: and of the SECOND, because “*seek the purification of your womb!*” may either mean, “see that your womb be free from progeny, in order to “your getting another husband,” (since this expressly applies to the same thing as is designed by the preceding word, “*count,*” and therefore may, in the present case, stand instead of it,) or it may mean, “see that your womb be free from progeny, in order that I may divorce you;” and where the husband intends the former meaning, a divorce reversible takes place, the same as in the preceding case:—and of the THIRD, because “*you are single!*” may either mean, “you are repudiated by a single divorce,” (and where such is the in-

are three
forms which
effect a re-
versible di-
vorce,

and seventeen
which effect
an irreverfible
divorce.

tention, a fingle divorce reverfible takes place, as by this form fuch a divorce is effected,) or it may mean “ you are fingle (having no other along with you,)” or “ you are fingle (among women, in “ beauty, and fo forth:”) thus, thefe words bearing a variety of conſtructions, intention is eſſentially requiſite to their effect:—and it is to be obſerved that thoſe forms occaſion no more than a *fingle* divorce, becauſe ſuch forms amount to “ you are divorced;”—and as, where the words “ *you are divorced*” are expreſſly mentioned, no more than a fingle divorce takes place, ſo alſo, in this caſe, a fingle divorce only takes place *a fortiori*, becauſe mere implication is weaker in its effect than the expreſſ mention of any thing *.—AND from all other implications of divorce beſides thoſe three, where divorce is the huſband’s intention, a fingle complete (or irreverfible) divorce takes place; or, if he intend *three* divorces, *three* divorces take place; or if *two*, *two* divorces: and theſe expreſſions of implication of divorce are as follow;—“ you are ſeparated!”—“ you are cut off!”—“ you “ are prohibited!”—“ the reins are thrown upon your own neck!”—“ be united unto your people!”—“ you are devoid!”—“ I give “ you to your family!”—“ I ſet you looſe!”—“ your buſineſs is in “ your own hands!”—“ you are free!”—“ veil yourſelf!”—“ be “ clean!”—“ go forth!”—“ go to!”—“ go!”—“ ariſe!”—“ ſeek “ for a mate!”—all which expreſſions are implicative of divorce, as each of them bears a conſtruction either of divorce or otherwiſe;— ſince “ *you are ſeparated!*” may either mean, “ you are ſeparated (from me in marriage,)” or “ you are ſeparated (from your family.”) In the ſame manner, “ *you are cut off!*” may either mean “ you are “ cut off (from marriage,)” or “ you are cut off from (your family “ and friends;)” and ſo alſo “ *you are prohibited!*” may either mean “ you are prohibited (in marriage,)” or “ you are prohibited (to me “ as a companion becauſe of your evil diſpoſition.”) In the ſame man-

* An obſervation is here introduced in the text, which, as it turns upon a point of grammatical criticiſm, is incapable of tranſlation, and is therefore neceſſarily omitted.

ner, "*the reins are thrown upon your own neck!*" may either mean "you are at liberty to go where you please, (as I have divorced you,)" or "you may go (to visit your parents," and so forth;) and so also, "*be united unto your people!*" may either mean "return to your family (as I have divorced you,)" or ("as you are unfit for society on account of the badness of your disposition.") "*You are devoid,*" may, in the same manner, either mean "you are devoid (of marriage,)" or "you are devoid (of virtue and religion;) and so also, "*I give you to your family!*" may either mean, "I return you to your family (as I have divorced you,) or "I return you to your family (on account of your evil disposition, in order "that you may remain there;") agreeably to the same mode of reasoning, "*I set you loose!*" may either mean "I set you loose (from the restraint of marriage, as having divorced you,)" or "I set you loose (to go where you please;)" so also "*your business is in your own hands!*" may either have respect to *divorce*, or to any other circumstance; and "*you are free!*" may either imply "you are free (from the bond of marriage,)" or, "you are free (as not being a slave;)" and so also "*veil yourself!*" may either mean "veil yourself (from me, as I have divorced you,)" or "veil yourself (that you may not be seen by a stranger;)" in the same manner "*be clean!*" may either mean "ascertain whether your womb be free from seed, that you may be enabled to marry with another man," or "that the descent of a child begotten upon you may be known;" and so also "*go forth!*" may either mean "go forth (as I have divorced you,)" or "go forth (to visit your parents;)" and "*go to!*"—"go!"—"arise!" may either signify "go to (and so forth) as I have divorced you," or "go to (and so forth) and do not provoke me to divorce you;" so also "*seek for a mate!*" may either mean "seek for a husband, as I have divorced you," or "seek for a proper companion to sit with you:" since therefore all those expressions admit the construction either of divorce or otherwise, the intention is essential to their effect, except where the husband uses them in reply to a requisition of divorce made by

by his wife, in which case the *Kázee* is to decree a divorce, but yet it does not exist as a divorce between the husband and God, unless such was his intention *.

THE compiler of the *Hedáya* observes that *Kadooree* has not made any distinction whatever between these expressions in divorce: on the contrary he has said, “ from all those expressions, “ when “ used in reply to a requisition of divorce, a divorce takes place, “ independant of the intention, in a *legal* view, but not in a *religious* “ view,” whereas it is not so, this rule being confined to such expressions as are incapable of being construed into a denial of the requisition of divorce.

It is to be observed as a rule, that there are three possible situations in which the person making use of these expressions may stand; FIRST, a *general* situation, that is, where he is neither swayed by *anger*, nor by any requisition of divorce, but acts from an unbiaffed volition; SECONDLY, where divorce is the subject of discourse at the time of speaking, (as, for instance, where it is demanded of him by his wife;)—THIRDLY, where he is under the impulse of anger. The expressions of implication are also of three kinds;—FIRST, those which equally bear a construction either of *denial* or *assent*;—SECONDLY, those which can be construed into *assent* only;—and, THIRDLY, those which may be construed either into *assent*, or into exclamations of *contumely* and *reproach*: and, in the *first* of these situations, divorce does not take place from any of those expressions but by intention; and if the husband declare that he had no such intention, his declaration is to be credited, because they all bear a double construction, and

* That is to say, although divorce take place in point of *law* from the judicial decree, yet *in foro conscientiae* the man must continue to hold himself married, insomuch that he cannot, without sin, marry another woman, in lieu of her who is thus divorced. This is the distinction between *law* and *religion* in divorce throughout.

hence

hence the intention is necessary to establish the effect: and, in the *second* situation, divorce takes place independant of the intention in a *legal* view, and the declaration of the husband is not to be credited, where he has used expressions bearing a construction of *assent* only; which are as follow:—

- “ You are disengaged !”
- “ You are separated !”
- “ You are cut off !”
- “ You are prohibited !”
- “ Count !”
- “ Your business is in your own hands !”
- “ Choose !”

The reason of which is, that the evident meaning of the husband, in using them in reply to a requisition of divorce, is *divorce*, as they do not bear a construction of *denial*; but if, in this situation, the husband use any of these expressions which may be construed equally into *denial* or *assent*, divorce does not take place but by intention; and the declaration of the husband, with respect to his intention is to be credited. The expressions alluded to are as follow:

- “ Go !”
- “ Get up !”
- “ Veil yourself !”
- “ Get out !” and so forth;

because these words may all be construed into denial of the request; and as the denial of a request is a circumstance less forcible than the act of divorce, they are rather to be taken in the *former* sense; but yet, as they also bear a construction of *assent*, they occasion divorce, where such is the intention. Those expressions may be construed into a denial of the request, on account that “ Go !” may mean “ quit thus speaking;” and in like manner “ Get up !” may mean “ Be gone ! and do not talk thus;” and the same of “ veil yourself !” as a direction to put on the veil sometimes implies an order to go away; wherefore

wherefore it may imply on this occasion “go away, and leave off speaking in this manner;” and the same also of “*get out!*”—but, in the *third* situation, divorce does not take place without the intention of the speaker, from the use of any expression of implication, except such as may be equally construed into assent, and into exclamations of *contumely* and *reproach*; and those are the three following:

“Count!”

“Choose!”

“Your business is in your own hands!”

from all of which, when used in anger, divorce takes place in point of *law*, independant of intention; and the declaration of the husband, denying such intention, is not to be credited, because the circumstance of anger proves the intention to be divorce.—It is recorded from *Abou Yoozaf* that if the husband were, in anger, to say, “I have no property in you!” or “I have no controul over you!” or “I give you your own way!” or “I have separated from you!” or “join yourself to your people!” his declaration is credited, even where he denies having intended *divorce*, because these expressions may all be construed into exclamations of *contumely* or *reproach*, as well as of divorce; as his words “*I have no property in you!*” may mean “because you are so base that you are incapable of being considered as a property;” and, in the same manner, his words “*I have no controul over you!*” may mean “because of the wickedness and stubbornness of your disposition;” and so also “*I give you your own way!*” may mean “because I cannot direct you;” and, in like manner, “*I have separated from you!*” may mean “because of your vicious disposition.”

WHAT has just been stated, *viz.* that “where the husband says, *you are separated!* or, *you are cut off!* divorce irreversibile takes place,” is the opinion of our doctors.—*Shafei* has said that the divorce occasioned by these words is *reversibile*, because the reason why those expressions

pressions occasion divorce is, that they are *implications* of divorce; whence it is that the intention is a condition of their effect, and also, that the divorce occasioned by them is complete in part of number, the same as in an *express* divorce, where the husband is authorized to pronounce three divorces, and having given one, his authority remains with respect to two other;—and also, that if he intend *three* divorces, *three* take place accordingly; and such being the case, reversal is lawful here in the same manner as in an *express* divorce, the thing which is implied.—The argument of our doctors on this point is, that the act of irreverfible divorce has proceeded in this case from a competent person, and is exercised upon a fit subject of it, according to the power by law established over the wife, which enables her husband to put her away in such a manner as that she shall be decisively and irreverfibly separated from him; and here the husband is competent to the act of irreverfible divorce, as being of sound mind and mature age; and the wife is a fit subject of it, as being lawfully liable to irreverfible divorce *before* cohabitation, (and also *after* it where her husband pronounces it for a compensation;) and this power, like many others, is instituted by the law with a view to the convenience of the individual, which sometimes requires a decisive separation to be effected *slowly* and *deliberately*, (as in divorce reverfible,) whereas, at other times, it requires that such a separation should take place on the instant, without any continuance of connexion with the subject of it, (as in the triple form of divorce,) and at other times it also requires separation to be completely effected on the instant, admitting a continuance of connexion with the subject; and it is indispensably necessary that this last species of irreverfible separation be also countenanced by the law, in order that the door of reparation may not be closed against the husband if he should repent; (that is to say, that it may remain in his power again to marry his wife, without her being previously married to another;) and also, in order that the woman's delicacy may be preserved from the effect of a divorce, by the man taking her back without the intervention of marriage with another; and such being the

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case, divorce irreverfible enfues from thofe expreffions.—In reply to the affertion of *Shafeï*, we obferve that thofe expreffions are not *poftively* implications, fince each of them may alfo be ufed in its own literal fenfe:—and as to what he further alledges, that “the intention is a condition of their effect,” (thence inferring that they are undoubtedly implications of *divorce*,) the inference is not admitted, becaufe the intention is made a condition for the purpofe of afcertaining one of two fpecies of feparation; and it is thus made a condition for the purpofe of afcertaining one of two forts of a feparation, which is a feparation from marriage, and not for the purpofe of divorce taking place: with refpect to what *Shafeï* further advances, that “the divorce “occasioned by any of thofe expreffions is incomplete in point of “number,” (thence inferring that they are implications of divorce,) we reply that the paucity of the number of divorces is not on account of thofe expreffions being *implications* of divorce, but becaufe divorce is eftablifhed on account of the connexion of marriage becoming diffolved; that is to fay, on account of thofe expreffions the tye is diffolved, and divorce fignifies the diffolution of a tye, wherefore divorce is neceffarily eftablifhed; the inference, therefore, is that the taking place of divorce is involved; but not that the aforefaid expreffions are *implications* of divorce:—and with refpect to what he further fays, that “if the husband intend three divorces from the ufe of any of “thofe expreffions, three take place accordingly,” (inferring that they are implications of divorce,) we reply that the intention of *three* divorces from thofe expreffions is approved only as three divorces is one fpecies of feparation, (for feparation is of two fpecies,—the *mild* and the *rigorous* *,) and, where there is no intention, the leaft forcible is eftablifhed.—It is to be obferved that an intention of two divorces is

* By the *mild* feparation is meant that fpecies of complete divorce which admits of the husband remarrying his repudiated wife without the neceffity of her intermediate marriage with another. By the *rigorous* feparation is meant that fort of complete divorce which does not admit of the man remarrying his repudiated wife until ſhe ſhall have been married to, enjoyed, and repudiated by another man. They have been already fully explained.

not approved with our doctors: contrary to the opinion of *Ziffer*: but this has already been treated of.

If a man say to his wife “count!—count!—count!” and afterwards declare that by the first of these words he meant divorce, and by the others the repetition of the woman’s courses [requisite to its completion,] his declaration is credited in point of *law*, as he appears to have intended these last words in their true sense, it being customary for a husband, where he divorces his wife, to desire her to count the courses necessary to the completion of her *Edit*; and hence apparent circumstances bear evidence to his intention: but if he were to confess that in these last words he had no particular intention, three divorces take place, because, from his intending divorce by the first word, it follows that he repeated it a *second* and *third* time, in a situation where divorce is the subject of discourse, and this situation proves his intention in these repetitions to be divorce also; wherefore, if he were to deny this intention, yet he is not credited, circumstances bearing evidence against him: contrary to where he declares that he had no intention of divorce in any of the three words, for there divorce does not take place at all, because circumstances do not tend to disprove his declaration: and contrary, also, to where he declares divorce to be his intention in the *third* word, but not in either of the *two* preceding, in which case no more than one divorce takes place, because, as he does not put the construction of divorce upon the two *preceding* words, it does not appear that divorce was the subject of discourse at the period of his speaking the *last*.—It is to be observed that the declaration of the speaker in denial of his intention is not to be credited, unless it be given upon oath, because he relates what, having passed solely in his own mind, cannot be known to any other person,—and hence he is the *Ameen*, or inquisitor, with respect to the intelligence he gives; and the declaration of an inquisitor is credited upon oath.

C H A P. III.

Of *Delegation of Divorce.*

Definition of
the phrase.

TAFWEEZ AL TALÂK, or delegation of divorce, is where the husband delegates or commits the pronouncing of divorce to his wife, desiring her to give the effective sentence, and it is comprehended under three different heads, termed *Option*, *Liberty*, and *Will*.

S E C T. I.

Of IKHTIYÂR, or OPTION.

Delegation
by option
confers on the
wife a power
of divorcing
herself; but
this right of
option is re-
stricted to the
precise place
or situation
in which she
receives it,

If a man say to his wife "choose!" (thereby meaning divorce,) or "divorce yourself!" the woman has a power to divorce herself so long as she remains in the precise situation* in which she received it; but if she remove, or turn her attention to any thing else, the power thus vested in her is done away, and her option no longer remains, because the exercise of the optional power thus committed to the woman is held, by all the companions, to be restricted to the precise situation in which it is received; and also, because this species of delegation is a *transfer of power*, not a *commission of agency*, and to give effect to the former, the reply is required on the spot of declaration,

* Arab. *Majlis*.—This term is treated of at large elsewhere.

the same as in sale, since all the moments of one situation are accounted as a single moment; but a situation may be altered, sometimes by change of place, at other times by chance of employment, because a situation of eating and drinking (for instance) is not that of disputation; and a situation of business, on the other hand, is neither a situation of eating or drinking, nor of disputation.—The right of option of the woman is annulled upon the instant of her rising from her seat, as that circumstance proves her rejection of it: contrary to the case of a *Sillim* or a *Sirf* sale, which does not become null upon the instant of rising or removing, the cause of invalidity there being *removal without seizin*.—And where the husband thus addresses his wife, an intention of divorce is a condition requisite to the effect, (as mentioned in the preceding chapter,) because the word “*choose!*” is one of the implications of divorce, as it is capable of two constructions, by one it desires the woman to choose *herself*, and by another to choose *her clothes*, and so forth: and if she choose *herself**, a divorce irreversibile takes place. Analogy would suggest, in this case, that from *choosing herself* nothing whatever should ensue, although divorce be the intention of the husband, because he cannot himself effect divorce by the use of such words; that is to say, if he were to say to his wife “I have chosen myself from you,” nothing whatever would follow, and consequently how can he give a delegation of this nature?—But here divorce takes place upon a more favourable construction, for two reasons;—FIRST, all the companions agree that divorce takes place from the use of this expression;—SECONDLY, the husband has it at his option either to continue the marriage with his wife, or to put her away, and hence it follows that he may constitute her his substitute with respect to that rule; and where the woman is thus left to her option, and says “I choose myself,” a divorce irreversibile takes place, because the woman’s *choosing of herself* cannot be established but by her becoming

and is annulled by her removal.

Intention, on the part of the husband, is requisite to constitute a delegation.

* This is an idiomatical phrase in the *Arabic*, signifying that *she chooses her liberty from the matrimonial tie*.

sole and independant, which can only be the case in irreverfible divorce, as, where it is *reverfible*, the husband is at liberty to take her back without her confent at any time during the continuance of her *Edit*, and thus ſhe would not become ſole and independant on the inſtant, which the nature of the caſe requires.

Under this form a *ſingle* divorce only takes place, whatever may be the intention:

It is to be obſerved that, in the caſe at preſent under conſideration, *one* divorce only can take place, and not *three*, although the husband ſhould actually have intended the latter option not being of different deſcriptions:—contrary to *complete ſeparation*, for if the husband were to ſay “you are completely ſeparated,” intending three divorces, the three take place accordingly, where ſuch is his intention, becauſe this complete ſeparation is of two deſcriptions, the *mild* and the *rigorous*, and it follows that intention with reſpect to one of theſe holds good.

and, to effect divorce, it is requiſite that the perſonal pronoun be mentioned by one or other of the parties,

It is alſo to be obſerved that, where the husband uſes the expreſſion “chooſe!” it is requiſite that the perſonal pronoun *ſelf* be mentioned either by the husband or the wife, inſomuch that if the husband were to ſay “chooſe!” and the wife answer “I have choſen,” divorce does not take place, becauſe the effect of divorce is eſtabliſhed by all the doctors upon the condition of the mention of the perſonal pronoun by one of the parties; and alſo, becauſe the pronoun cannot be underſtood under any circumſtances of *ambiguity*, and theſe words of the woman bear two conſtructions; one, that ſhe chooſes *her husband*, (which would not occaſion divorce;) and another, that ſhe chooſes *her ſelf*, (which would occaſion irreverfible divorce;) divorce, therefore, does not take place in defect of the pronoun, on account of the ambiguity.

that is, either by the husband, in his declaration,

If a man ſay to his wife “chooſe yourſelf,” and ſhe answer “I have choſen,” a divorce irreverfible takes place, becauſe the word *ſelf* here occurs in the words of the husband, and the words of the

woman

woman are in reply to him; and hence her words virtually comprehend *herself*.—And, in the same manner, if the husband were to say “choose an option,” and she reply “I have chosen,” a divorce irreverfible takes place: the proofs here are drawn from the *Arabic*.

If a man fay to his wife “choose!” and she reply “I have chosen myself,” divorce takes place, where fuch was the husband’s intention, becaufe the word *self* here occurs, in the reply given by the woman, and the expreffion of the husband bears the construction of that which he intended.

or, by the wife, in her reply:

If a husband fay to his wife “choose!” and she reply to him in the *Mozáree* tenfe, [which, in the *Arabic*, is common to the prefent and future,] faying “I do (or will) choose myself,” divorce takes place, on a favourable construction.—Analogy would fuggelt in this cafe that no divorce takes place, becaufe, if the woman’s reply be taken only in the *future*, it ftands as a *promise*, and bears that construction alfo, if taken in the *prefent*; and hence divorce does not take place, from her anfwer amounting only to a *promise* in the *former* tenfe, and from its *ambiguity* in the *latter*; as if a man were to fay to his wife “divorce yourfelf,” and she were to reply *Atliko Naffee* [“I do (or will) divorce myfelf,”] in which cafe divorce does not take place, and fo in this cafe likewise: but the reafons for the more favourable construction are twofold;—FIRST, it is recorded that, upon the defcent of the paffage of the *Koran* relating to option, *viz.* “O, MY SON! SAY TO YOUR WIVES, *If you defire the life of this world*,” (to the end,)—the prophet faid to *Aysha*, “I have fomething to mention to you, but do not reply to it until fuch time as you confult your parents,” after which he read to her the above paffage, and then gave her an option; and *Aysha* faid “in fuch a matter as this I fhall not confult my father or mother, but will (or do) choose
“ God

and divorce takes place, although her option of it be expreffed in the *Mozáree* or common tenfe.

“God and his prophet,” which words the prophet considered as a reply, importing “I *do* choose;”—SECONDLY, the word *Akbtarto*, [“I *do* (or *will*) choose myself,”] expresses the *present* literally, and the *future* figuratively, the same as the word *Afbado*, [I *do* (or *will*) testify,] in giving evidence before a magistrate: contrary to where a woman answers *Atliko Nafsee*, [I *do* (or *will*) divorce myself,] for here it is impossible to receive her words in a *present* sense, as they do not relate to a thing now existing; whereas the expression *Akbtarto*, [I *do* (or *will*) choose myself,] on the contrary, relates to a thing now present, to wit, the woman choosing *herself*.

Where the husband gives a power of option thrice repeated, and the wife make only a *single* reply, yet three divorces take place from it, independent of the husband's intention.

If a man say to his wife “choose!—choose!—choose!” and she reply “I have chosen the *first*, or “the *second*,” or “the *third*,” three divorces take place, according to the doctrine of *Haneefa*, and the intention of the husband is not requisite, although the word here used be an implied expression, because his repetition of the word “choose!” proves his intention to be divorce, as the option given to the woman is repeated only with that view*.—The two disciples say that only one divorce takes place in either case; but they agree with *Haneefa*, that the intention is not essential, for the reason above assigned.—And, in the same manner, if the woman were only to reply “I have chosen,” it is effective of *three* divorces. And so also, if she were to reply “I have chosen a choice.”—This is admitted by all the doctors; because, where she only says “I have chosen,” it is productive of three divorces; and, consequently, when she speaks in a way to give this additional force, it produces the same *a fortiori*.—And if she were to reply “I have divorced myself,” or “I have chosen myself with respect to one divorce,” one divorce reversible takes place.

Where the word *divorce*

If a man say to his wife “one divorce is at your option,” or

* Some grammatical reasoning, incapable of translation, is omitted in this part.

“choose

“choose with respect to a single divorce,” and she reply “I have chosen myself,” one divorce reversible takes place, because the man has given the woman an option so far as one divorce, and expressing it in *direct* terms (as above) the divorce proceeding from it is reversible*.

is mentioned by the husband, the divorce which follows is reversible.

SECT. II.

Of AMIR-BA-YED†, or LIBERTY.

If a man say to his wife “your business is in your own hands,” intending three divorces, and the woman answer “I have chosen myself with one choice,” three divorces take place. The proof of this is drawn from the nature of these expressions in their original idiom.

In a delegation of liberty divorce takes place according to the number mentioned by the wife, independent of the husband's intention: and the divorce which follows is irreversible.

But if the woman were to reply “I have divorced myself with one divorce,” or “I have chosen myself by one divorce,” one divorce only takes place; and this divorce is *irreversible*, although the reply be delivered in *express* and not in *ambiguous* terms, because it bears relation to the words of the husband, which being an implication, amount to a delegation of *irreversible* divorce, and not of *reversible*. —The reason why an intention of three divorces is admitted in the present instance, is that the words “your business is in your own

* Because an *express* divorce is uniformly reversible, unless otherwise specified.

† This is a contraction of *Amir-ke-ba-Yed-ke*, literally “your business is in your own hands,” *i. e.* “you are at liberty to do as you please.”—The word *liberty* is adopted singly, for the sake of *brevity*.

“hands” are capable of both a *restrictive* and an *extensive* construction, and hence may imply *three* divorces, as well as *one*; an intention to that effect therefore holds good, since that is one of the senses in which the words may be taken: contrary to the expression considered in the preceding section, to wit, “*choose!*” that being incapable of bearing an extensive construction, as was there demonstrated.

Delegation of liberty may be restricted to a particular time, or to several different specified periods of time:

If a man say to his wife “your business is in your own hands this day, and after to-morrow,” the night is not included:—and if the woman reject the liberty thus given to her for *this* day, it is, with respect to *this* day, annulled; but it still remains to her for the day after the morrow, because the husband has expressly specified two particular periods, with the intervention of a similar period, to which the liberty does not extend, (to wit, *to-morrow*;) and hence it appears that those are two distinct liberties, and the rejection of one does not amount to a rejection of the other.—Ziffer says that both amount only to a single liberty, this being analogous to a case where a man says to his wife “you are divorced this day and the day after to-morrow,” which implies *one* divorce only, and not *two*, (on the idea of one taking place this day, and the other the day after the morrow;) and hence, in like manner, one liberty only is implied.—But to this it may be replied that divorce is not of a nature to admit restriction to any particular time, whereas liberty is capable of such restriction; and hence that which regards the *first* period mentioned is restricted to *that* period, and that which regards the *second* period commences *de novo*.

If a man say to his wife “your business is in your own hands to-day and to-morrow,” the night is comprehended in it: and, if the woman should reject the liberty on the instant, it is totally annulled, and does not return on the morrow, (according to the *Zâhir Rawâyet*,) as this amounts only to one liberty, because that between the

two

two periods specified no similar period intervenes to which the liberty does not extend.

OBJECTION.—Although a period similar to the two specified does not intervene, yet *night* intervenes, from which it would follow that the liberty given for to-day and to-morrow is not a single liberty.

REPLY.—Two distinct liberties are not occasioned by this circumstance, because the intervention of *night*, although it may interrupt or suspend a matter, does not divide or terminate it, as in a public court, for instance, which may, on account of the night coming on, be adjourned, without any actual breach in the series of its proceedings; thus it is the same as if the man were to say “your business is in your own hands for *two days*,” in which case a single liberty only is understood.

It is recorded, from *Aboo Hancefa*, that although the woman should reject the liberty on the instant, yet it still remains with her for the following day, as she is not empowered to reject it, (that is to say, she cannot refuse her assent to receiving it,) it becoming established in her upon the husband saying “your business is in your own hands,” independent of her consent; (as in the direct execution of divorce, for instance, where, if the husband were to say “you are divorced,” divorce takes place independent of the consent of the wife;) and such being the case, liberty remains still with her for the morrow, when she may lawfully make use of it by choosing divorce. The ground upon which the *Zâbir Rawâyet* proceeds, is that as, if she were to choose divorce as *this* day, no liberty remains with her for *to-morrow*, so if she reject the liberty this day, no right of choice remains with her for to-morrow, because a person who has a choice of two things is not authorized to choose more than *one* of them.

and it is not annulled by the wife's rejection of it until the time or times mentioned be fully expired.

It is recorded, from *Aboo Yoosaf*, that if a husband say to his wife “ your business is in your own hands for this day, and the “ same for to-morrow,” this amounts to two liberties, because here the delegation applies to two portions of time, distinctly and separately expressed: contrary to the preceding case, where the times are not thus discriminated, but are both mentioned under one head.

The time of it may be fixed for the occurrence of any specified event.

If a man say to his wife “ your business is in your own hands on “ the day on which such an one arrives,” and the person mentioned arrive, but his arrival be not known to the wife until night, her right of choice no longer remains, because liberty is a thing of continuance, and hence the word *day*, with which it is associated, is restricted to the *day* time, and that having passed away, it discontinues.

It is not annulled by *delay*, (where there is no specification of time,) nor until the wife rises from her seat, &c.

If a man say to his wife “ your business is in your own hands,” or “ choose!” and she delay answering the whole day, and do not rise from her seat, her right of option remains to her so long as she does not employ herself in any other matter, because a delegation of divorce by the forms of *liberty* or *option* is a *transfer of power* to execute divorce, (that is, the husband by that delegation empowers his wife to give divorce, as persons are termed *empowered* who act for *themselves*, and the act of the woman here is *pronouncing divorce upon herself*, wherefore this property is supposed to reside in her,)—and *in transfer of power* a privilege of reply continues to the end of the situation of declaration, as has been demonstrated in the beginning of this chapter. And if the woman *bear* the declaration, respect is had to the situation in which she hears it; but if she should not *bear* it, respect is, in that case, had to the situation in which she is informed of it, because, although *Amir-ba-Yed*, or *liberty*, be a transfer of power to execute divorce, yet the property of *suspension* is also allowed to exist in it, as it is a *suspension* of the event of divorce upon the

the act of the wife in pronouncing it, and hence it comprehends two things, a transfer of *power*, and a *suspension*;—in the sense of a *suspension*, it continues in force beyond the *Majlis*, or continuance of the situation of declaration, to the *Majlis* or situation in which the woman understands or is informed of it, where she is absent, or in the sense of a *transfer of power*, it is annulled, on her rising from her seat, where she is *present*; but the situation of the husband is not regarded, because the suspension is *absolute* with respect to *him*: contrary to a case of *sale*, as in that the declaration of sale does not remain in force beyond the *Majlis* of declaration, since in a sale the *Majlis* or situation of the *seller* is regarded as well as that of the *purchaser*; and the retraction of the *seller*, at any time previous to the consent of the purchaser, is admitted, as *sale* is merely a *transfer of property*, in which suspension is not at all understood; now since it appears that the situation of the *wife* alone is regarded, and not that of her *husband*, we must recollect that her situation may be altered in various ways, sometimes by removal from one place to another, and sometimes by her employing herself in any other matter, as was previously stated.

THE option of a woman who is left at liberty to choose is annulled on the instant of her rising from her seat, as this act proves rejection, because by getting up the attention is deranged and withdrawn from the present subject: contrary to a case where she delays answering for a whole day, for instance, and does not rise from her seat, nor employ herself in any thing else; for here her option remains to her, as a *Majlis* or situation is sometimes of a *short* and sometimes of a *long* duration, wherefore her right of option continues until such time as something appears sufficient to terminate the *Majlis*, or to prove *rejection*.—And here it is to be observed, that by *employing herself in any thing else* is to be understood such a thing as is, in its nature, terminative of her *situation*, and not any *general* thing.

but it is annulled on the instant of her rising from her seat.

It is not annulled by a change of posture from a mere *active* to a mere *quiescent* position.

If the woman be *standing*, at the period of receiving the liberty of option from her husband, and afterwards sit down, her option remains, and is not annulled, as her *sitting* does not imply *rejection*, but rather the contrary, since her attention is thereby more collected.— And the rule is the same where the woman, being seated, leans upon a *pillow*, or having leaned upon her pillow, (at the time the husband speaks,) sits up *without* a pillow, because these are no more than changes from one mode of sitting to another, and do not import rejection any more than where a person sitting upon *one* part changes and sits upon *another*.— Our author remarks that this is the doctrine of the *Jama Sagheer*, and is most approved.— It is elsewhere said, that where the woman is sitting up *without* a pillow, and then *leans* upon a pillow, option no longer remains, as this shews an indifference respecting it amounting to a rejection.

A wife may signify her wish to consult her friends, without prejudice to her right of option.

If the woman, on receiving a liberty of option, say that she wishes to see her father, in order to consult him, or to get witnesses, in order to have their evidence, her option remains, because counsel is expedient in every business, and witnesses are requisite to controvert the husband's denial of the fact; and hence neither of these wishes expressed on her part is a proof of rejection.

If the woman be riding upon a quadruped, or in a camel-litter, and stop the animal on her husband's offer of liberty, still the right of option is not annulled: but if she proceed upon her journey, it is annulled, because the *going* on or *stopping* of the *animal* is the same with those acts in the *woman*, since its motions depend upon the *rider*.

A BOAT or ship is the same as a house, as by the going on of the vessel the woman's option is not annulled, because its motion does not always depend upon the person whom it carries.

S E C T. III.

Of MASHEEAT, or WILL.

IF a man say to his wife “divorce yourself,” not having any particular intention, or intending *one* divorce, and the woman reply “I have divorced myself,” a single divorce reverfible takes place: and if ſhe were to ſay “I have given three divorces,” three accordingly take place, where ſuch is the intention of the huſband: the reaſon of this is that divorce, being a general expreſſion, takes place in the loweſt ſpecies; but as, like other generic nouns, it alſo applies to the *whole*, an intention of three divorces is admitted: and, where there is no particular intention, a ſingle divorce reverfible takes place, becauſe the power of divorce is delegated to the wife in expreſs terms, and expreſs divorce occasions a divorce reverfible.—If the huſband ſhould in this caſe intend *two* divorces it is not admitted, becauſe a generic noun does not bear that conſtruction, where the woman is *free*; but, if ſhe be a *ſlave*, an intention of *two* divorces is admitted, that being conſidered as the *whole*, with reſpect to *her*.

Where a man empowers his wife to divorce herſelf in expreſs terms, the divorce which follows is reverfible.

IF a man ſay to his wife “divorce yourſelf,”—and ſhe reply “I have ſeparated myſelf,” a divorce reverfible takes place, becauſe ſeparation is of the ſame nature with divorce, ſince, if a huſband were to ſay to his wife “I have irreverſibly ſeparated you [from me,] intending *divorce*, a divorce irreverfible takes place:—and, in the ſame manner, if the woman were (as here) to ſay “I have ſeparated myſelf,” and her huſband reply “I have conſented thereto,” ſhe becomes irreverſibly divorced; and hence the expreſſion of the woman “I have irreverſibly ſeparated myſelf,” ſtands the ſame as the huſband’s delegation, which is of *ſimple* divorce: but here the deſcription of *irreverſibility*

although her reply be expreſſed in the form of an *irreverfible* divorce.

versibility which the woman has added to the *simple* divorce is held to be *nugatory*; and the simple divorce only takes place; as if she had replied "I have repudiated myself by one irreverfible divorce," in which case a divorce *reverfible* only would take place: contrary to a reply of option, for if she were to answer "I have chosen myself," no divorce whatever would take place, as these words are not of the same nature with divorce, for which reason it is that if a man were to say to his wife "I have chosen you," or "choofe!" intending divorce, no divorce whatever takes place; and in like manner, if the woman were to speak first, saying "I have chosen myself," and her husband reply "I have consented," no divorce whatever takes place: yet it is an univerfally received doctrine that if the woman say "I have chosen myself," in reply to a delegation of option, divorce takes place; but the words of the husband in the present case, namely, "divorce yourself," is not a delegation of option, and hence the reply of the woman, as above stated, "I have chosen myself," is nugatory.

It is recorded, as an opinion of *Haneefa*, that in the present case divorce does not take place from the reply of the wife, "I have separated myself," because the woman acts contrary to the power vested in her, by taking upon her to pronounce a thing different from that delegated to her by her husband, as the expression "separated" is different from divorce, the one being *implicative* and the other *exprefs*; and the husband delegated *exprefs* divorce only.

The power,
when thus
granted, can-

If a husband say to his wife "divorce yourself," he is not at liberty to retract, as his expression involves a vow*, because he has,

* Literally, "his words *exprefs* (or amount to) a *Yameen*," that is to say, suspend the matter spoken of upon the occurrence of some condition on the event of which that matter takes place, independant of any farther volition on the part of the speaker; and it is therefore, with respect to him, absolute and unretractable. *Yameen* is here translated *vow*, as the above is one definition of vow.

in this instance, suspended divorce upon the execution of it by his wife, and a vow is an obligatory act, for which reason a man is not allowed to recede from it. If, however, the woman rise from her seat, or remove from the place, the words of the husband, as above, transferring the power of divorce to her, are annulled, their force being confined to the situation where the offer is made:—contrary to where he says to her “divorce your *Zirra*, [fellow-wife,]” as this is a *commission of agency*, which is not restricted to *place*, and may be therefore retracted by the constituent whenever he pleases.

not be re-
tracted.

If a husband say to his wife “divorce yourself when you please,” she is at liberty to divorce herself either upon the spot or at any future period, because the word *when* extends to all times; and hence it is the same as if he were to say “divorce yourself at whatever time “you like.”

The power
may be
granted *gene-
rally*.

If a man say to another “divorce my wife,” the person thus addressed may divorce her either upon the spot or at any other time, and the husband may also retract, because this is a commission of agency, and therefore is not absolute, nor restricted in point of place: contrary to where he says to his wife “divorce yourself,” this being a *transfer of power*, not a *commission of agency**, as the woman thus addressed acts from herself and not from another. But if a man say to another “divorce such an one my wife,” (adding) “if you please,” the man is empowered to divorce the wife upon the spot only; and here the husband cannot retract.—*Ziffer* says that this and the preceding case are alike, the addition of “*if you please*” in the *one* instance, or the omission of it in the *other*, making no difference, because the person so commissioned afterwards acts from his own will, like an

* That is to say, after being thus empowered, she stands as a *principal* in the execution of divorce, and not as an *agent*; and a commission of agency may be annulled at pleasure, whereas the power devolved to another to act as a principal cannot be so.

agent in sale, to whom it may have been said “sell this thing, *if you please*.”—The argument of our doctors is that the words of the husband are a transfer of power, as he suspends the divorce upon the will of the person whom he addresses, and he is the principal who acts from his own will; divorce, moreover, admits of suspension, whereas sale does not.

A wife empowered to give herself three divorces may give herself *one* divorce:

If a man say to his wife “give yourself three divorces,” and she give herself *one* divorce only, it takes place accordingly, because, having been empowered so far as *three* divorces, it necessarily follows that she is enabled to give a *single* one.

but, when empowered to give herself *one* divorce only, she cannot give herself *three*.

If a man say to his wife “divorce yourself once,” and she give herself three divorces, nothing whatever takes place, according to *Haneefa*.—The two disciples say that a single divorce takes place, because the woman has done that to which she *was* empowered, together with that to which she was *not* empowered; and hence it is analogous to a case in which a husband says to his wife “I repudiate you by a thousand divorces” where three divorces take place, because he has pronounced that to which he *is* empowered along with that to which he is *not* empowered; consequently the former takes effect, but the latter is nugatory; and so likewise in the present case.—The argument of *Haneefa* is that the wife has, in this case, attempted to do an act, the power of doing which has not been delegated to her by her husband, and hence she appears to divorce herself, *first*, and not *in reply* to the desire expressed by him, as he has empowered her so far as *one* divorce only, and between *three* divorces and *one* there is a contradiction, the word *three* expressing a compound number, and *one* a single unit: contrary to where a man pronounces *a thousand* divorces upon his wife, as here *three* take place, because he acts in consequence of the desire of another:—and contrary also to the preceding case, (*viz.* where the husband desires his wife to repudiate herself by *three* divorces, and she declares *one* only,) for here one divorce takes place on account

account of her being empowered so far as *three*; whereas, in the present case, she is not empowered so far as *three*, and having acted contrary to the power vested in her, what she does is nugatory.

IF a man desire his wife to repudiate herself by a *reversible* divorce, and she divorce herself *irreversibly*, or the contrary, that mode of divorce takes place which was desired by the husband: thus, if a man say to his wife “give yourself one divorce reversible,” and she reply “I have given myself a divorce *irreversible*,” a divorce reversible takes place, because the woman has declared a divorce in express terms, but with an additional description, and the *latter* is nugatory, as being contrary to the desire expressed by the husband; but the *former* (which is in its nature *reversible*) takes place, as being in conformity to the husband’s desire:—and, on the other hand, if the husband say to his wife “give yourself one divorce irreversible,” and she reply “I have given myself a divorce reversible,” a divorce irreversible takes place, because the description of *reversibility* attached to the divorce by the wife is nugatory, since the husband, having himself affixed a description to it, does not require more of his wife than simply *divorce*, without any description; hence it is the same as if she had pronounced the divorce itself in a defective way: thus the divorce takes place under whatever description may have been affixed to it by the husband, whether *reversible* or *irreversible*.

Where the wife’s reply disagrees with the husband’s declaration in respect to the nature of the divorce, it takes place according to his declaration, not according to her reply.

IF a man say to his wife “divorce yourself thrice, *if you please*,” and she give herself one divorce, no effect whatever follows, because the meaning of his words is “if you desire *three* divorces, repudiate yourself,” and the woman giving *one* only, it appears that she does not desire *three*, and hence, the condition not being fulfilled, the divorce does not take place.

Where the power is conditional upon the pleasure of the wife, it is annulled by her reply disaccordant with the husband’s declaration;

IF a man say to his wife “divorce yourself once, *if you please*,” and she give herself *three*, no divorce whatever ensues, according to

Haneefa, because a desire of *one* divorce only is essentially different from a desire of *three*, this being analogous to a case of execution as before mentioned, that is to say, as the execution of *three* divorces in that instance was demonstrated to be a sensible contradiction to that of *one*; so, in the present instance, a wish for *three* is contradictory to a wish for *one*; and, from the woman pronouncing upon herself *three* divorces, it appears that she was not desirous of *one*; and hence the condition is not fulfilled.—The two disciples say that one divorce takes place on this occasion, because a desire for one divorce is comprehended in a desire for *three*, on the same principle as the execution of *three* divorces comprehends that of *one*, (agreeably to their doctrine before mentioned;) and hence the condition is virtually fulfilled.

and so also,
by her sus-
pending her
will upon that
of her hus-
band.

If a man make a delegation of divorce to his wife, by saying to her, “you are divorced if you be desirous of it,” and she reply “I am desirous, if you desire it,” and he reply, in return, “I am desirous,” (intending divorce,) the delegation is void, because the husband has suspended the divorce upon the will of the woman where that is unrestricted, that is to say, independant of any thing else; but, from the conversation, it appears that she suspends her will upon that of her husband, and hence the condition of divorce, namely, the independant will of the woman, is not fulfilled; thus she does not act from option; and the delegation is void of course.—The words of the husband, in the last reply, namely, “I am desirous,” are not effective of divorce, although such be his intention, because there is no mention whatever of divorce in the words of the woman, from which the husband’s wish to that effect might be inferred in his answer, and the *intention* alone does not suffice, as it has no operation with respect to a thing not mentioned; whereas, if he were to say, “I am desirous of your divorce,” it takes place if he so intend it, because he in this case appears to give divorce *de novo*, as a desire expressed with respect to any thing implies the existence of that thing, and hence his expression “I am desirous of your divorce,” is as if he were to say “I
cause

“*cause* your divorce,” which accordingly takes place: contrary to what would follow, if he were to say “I intend your divorce,” in which case divorce would not take place, because an intention expressed does not imply the existence of the thing intended.—If, moreover, in the case now recited, the woman were to reply “I am desirous if my *father* be so,” or “if such a circumstance happen,” (meaning a circumstance which does not yet exist,) and the father afterwards signify his desire, or the circumstance upon which she has suspended the divorce come to pass, yet divorce does not take place, and the delegation is void:—but if she, in saying “if such a thing happen,” mean a thing which has already passed, divorce takes place, because suspension upon a condition already fulfilled amounts to immediate or unsuspended divorce.

If a man say to his wife “you are divorced *when* you please,” or “*whenever* you please,” and she reject his offer, saying “I am not desirous of it,” her rejection is not final, for here the power vested in her is not confined to the place or situation where it is delegated, on which account she is at liberty to use it either *there* or *elsewhere*, because the terms *when* and *whenever* are used with reference to *all* times, and extend to every time indiscriminately, and hence the sense of the expressions “when you please,” and “whenever you please,” is “at whatever time you please,” and they are, therefore, not confined to *place*. And if the woman reject at present, still it is not a final rejection, because her husband has empowered her to divorce herself *at whatever time she pleases*, wherefore the power does not apply to the time when she does *not* please.—But it is to be observed that the woman is not in this case authorized to pronounce upon herself more than one divorce, because the words *when* and *whenever* apply to all times, but not to more than a single divorce; thus she is authorized to divorce herself *at whatever time she pleases*, but not to pronounce divorce *as often* as she pleases.

When the power is expressed with an unrestricted particle, (in respect to time,) it is perpetual, extending to all times and places:

IF

If a man say to his wife “you are divorced *as often as you please*,” she is at liberty to divorce herself time after time, until three divorces, because the expression *as often* admits a repetition of the act:—but it is to be observed that this suspension of divorce upon the woman’s will is restricted solely to the marriage at present existing, and does not extend to that which may afterwards occur; and hence if the woman give herself three divorces, and be again married to the same man, after being rendered lawful to him, and then pronounce divorce upon herself, it does not take place, because a marriage has then occurred *de novo*;—and it is also to be remarked that the woman is not at liberty to pronounce the three divorces upon herself in one sentence, because the expression “*as often as*” implies *unity*, and does not admit of the circumstances to which it relates being taken collectively, and hence it is lawful for the woman to pronounce three divorces upon herself at *three separate times*, but not at *once*.

but not when
it is expressed
with an un-
restricted par-
ticle in re-
spect to place.

If a man say to his wife “you are divorced *wherever you please*,” yet the woman cannot divorce herself but in that place; and if she rise from her place before she pronounce it, her will is not regarded afterwards, because the words *wherever*, or *wheresoever*, are adverbs of place, and divorce has no connexion with place; the word *wherever* is therefore nugatory, and the will only remains, which is confined to the precise place: contrary to the case of *time*, (that is, where the husband says “*when you please*,”) to which divorce has a relation, as it may take place at *one* time and not at *another*, and hence the mention of time in divorce is regarded, whether it be *particular*, as “you are divorced *to-morrow*,” or *general*, as “you are divorced *when you please*.”

If a man say to his wife “you are divorced *how you please*,” and she remain silent, a divorce reversible takes place, whether she be desirous or not: or, if she break silence, and say “I am desirous of

“one divorce reverfible,” and the husband reply “fuch alfo is my
“defire,” divorce takes place accordingly, becaufe a conformity is
eftablifhed between the will of the wife and the intention of the
husband; but where the wife defires three divorces, and the husband
only *one* divorce irreverfible, or the contrary, a divorce reverfible
takes place, becaufe her act is rendered nugatory by the non-con-
formity of her will with that of her husband, and his words (viz.
“you are divorced,”) remain, which are effective of a divorce rever-
fible: but if the husband have no particular intention, the will of the
wife alone is regarded, infomuch that, whether ſhe defire *three* di-
vorces, or only *one irreverfible* divorce, it takes place accordingly, in
the opinion of our modern doctors, as this is what a right of option
requires.—The compiler of the *Hedaya* obſerves that *Mohammed*, in
the *Mabſoot*, ſays that the taking place of one divorce independant of
the will of the wife, as above, is the doctrine of *Haneefa*; but that,
with the two diſciples, divorce does not take place ſo long as the
woman does not divorce herſelf; thus ſhe has her option of either *one*
divorce *reverfible* or *irreverfible*, or of *three* divorces: and the ſame
difference of opinion ſubſiſts with reſpect to manumiffion; that is to
ſay, if a maſter ſay to his ſlave “you are emancipated *how* you pleaſe,”
the ſlave is free upon the inſtant, according to *Haneefa*; whereas,
according to the two diſciples, he is not free, ſo long as he is not de-
ſirous of being ſo.—The argument of the latter is that the husband
has delegated to his wife a power to effect divorce upon herſelf under
whatever deſcription ſhe pleaſes, whether a *ſingle* divorce *reverfible* or
irreverfible, or *three* divorces; and hence it is indifpenſably requiſite
that the divorce itſelf be alſo ſuſpended upon her will, ſo that a will
ſhall be confirmed to her in all circumſtances, that is, both *before*
carnal connexion and after it; for, if the divorce itſelf were not ſuſ-
pended upon the will of the wife, it would follow that the wife could
have no will with reſpect to the deſcription of the divorce before carnal
connexion, as before conſummation ſhe cannot give herſelf three di-
vorces, ſince in ſuch caſe the wife becomes irreverſibly repudiated by a
ſingle

single divorce before the passing of her *Edit*, and no longer remains a subject of divorce.—The argument of *Haneefa* is that the word “*how*” implies a requisition of description; now delegation of the description of a thing requires the existence of the subject of it, and divorce cannot have existence but by taking place.

If a man say to his wife “you are divorced by *as many as* you please,” or “by *what* you please,” she is empowered to divorce herself by whatever number she pleases, as the expression *as many as* and *what* are used with relation to number; and hence the husband appears to have delegated a power to the woman with respect to whatever number she may approve. If, however, she rise from her place before pronouncing any divorce the delegation is void; or if she reject, her rejection is final, because this sort of *singular* delegation does not argue or admit a repetition of the act; and the address implying a thing required to be *immediately* determined upon, consequently demands an *immediate* answer.

If a man say to his wife “divorce yourself *what* you please, out of *three*,” she is empowered to give herself *one* or *two* divorces, but not *three*, according to *Haneefa*.—The two disciples, on the contrary, maintain that she may give herself *three* divorces, if so inclined.—The arguments on both sides are drawn from the *Arabic*.

C H A P. IV.

Of Divorce by a *Yameen*, or Conditional Vow.

By *Yameen* is here understood the suspension of divorce upon a circumstance which bears the property of a *condition*, and this suspension is termed *Yameen*, because *Yameen*, in its primitive sense, signifies *strength* or *power*; and the suspension is a motive to the suspender to be strong in the avoidance of the condition, in such a manner that he may not be subjected to the *consequence* or *penalty*, which is *divorce* or *manumission*.

WHERE a man refers or annexes divorce to marriage, (that is, suspends it upon marriage,) by saying to any strange woman "If I marry you, you are divorced," or by declaring "any woman whom I may marry is divorced," in this case divorce takes place on the event of such marriage.—*Shafei* maintains that divorce does not take place, the prophet having said that there is no divorce antecedent to marriage.—The argument of our doctors is that the annexing of divorce to marriage is a *Yameen*, or suspension, as appears from its containing a condition and a consequence, and present authority is not requisite to its propriety, because the divorce does not take place until the occurrence of the condition, at which time the authority necessarily takes place; and the end which it answers, before the occurrence of the condition, is, that it restrains the vower from marrying that woman, as his meaning in the expression is "I will not marry you, or, if I do, you are divorced." With respect to the saying of the prophet cited by *Shafei*, it goes to the prohibition of immediate

Definition of the term *Yameen* with respect to divorce.

Divorce, pronounced with a reference to a future marriage, takes place upon the occurrence of such marriage;

divorce only, and not of that which is suspended upon the occurrence of a future possible event.

or upon the occurrence of any *other* circumstance on which it may be conditionally suspended;

IF a man annex divorce to a condition specified, by saying to his wife "if you enter this house you are under divorce," the divorce takes place upon the occurrence of the condition. This is universally admitted by the learned, because of the existence of the matrimonial authority, at the time of the husband's declaration; and it is evident that this declaration remains in force until the condition be accomplished.

provided it be pronounced during an *actual*, or with reference to an *eventual*, possession of authority.

BUT the annexing of divorce to marriage is not lawful, unless the vower be either authorized at the time, or annex divorce to a future possession of authority; as it is indispensably requisite that the penalty be a thing of probable occurrence, in order that the apprehension of it may operate upon the fears of the vower, and that thus the property of *Yameen*, (viz. restraint from the apprehension of penalty,) do really exist at the time of declaring the condition, in virtue either of *present* authority, or of a reference to a *future* authority.

OBJECTION.—What is now said appears to contradict the doctrine advanced in the preceding case, of a man annexing divorce to marriage, by saying to a strange woman "if I marry you, you are divorced," for in that case he is neither in *present* authority, nor does he annex divorce to the future possession of it.

REPLY.—Although he does not annex the divorce to an existing right, yet he annexes it to the cause of a right which may exist, (namely, marriage*), and annexation to the cause is the same as to the right itself, because in the former the latter is involved.—But if a man say to a strange woman "if you enter such an house you are divorced," and he afterwards marry her, and she then enter the

* Marriage being the cause of the right to divorce.

said

said house, divorce does not take place, because in this case he is neither invested with any present right, nor does he annex the divorce either to a future right or to the *cause* thereof.

THE conditional particles are as follows, viz. “*if*,”—“*when*,”—“*whenever*,”—“*whenever*,”—“*whenever*,”—and “*as often as*.”—Of these the particle “*if*” is solely conditional; in the use of the others condition is implied.—And under the four first of these expressions, upon the condition being fulfilled, the *Yameen*, or vow, is completed, and no longer exists; that is to say, if the condition should again occur, the penalty is not incurred a second time, because the words abovementioned do not involve all future acts of the kind expressed in the condition, nor do they demand a repetition of the penalty; and hence, where the act which constitutes the condition is once found to occur, the condition is fulfilled, and no longer remains; and the vow does not continue in force without the condition; but from this rule must be excepted the expression “*as often as*,” which applies universally, and such being the case, it is requisite that the penalty be repeatedly incurred;—in every case, therefore, where divorce is the penalty derived from the use of “*as often as*,” it repeatedly takes place upon the recurrence of the condition.

Five conditional particles of various effect.

IF a man say to his wife “you are divorced *as often as* you enter “the house,” and she enter it *three times*, and then marry another man, and afterwards again marry her first husband, and the condition should then occur, divorce does not take place, as no penalty remains on account of its having been completely incurred in the three divorces which followed the repetition of this act in the first marriage; and as the continuance of a *Yameen*, or conditional vow, depends upon the continuance of the condition and the penalty, when these no longer remain the vow discontinues also.

IF the words “*as often as*” be introduced in reference to marriage, by a man saying “as often as I marry any woman she is divorced,” divorce takes place upon every instance of his marrying afterwards, though he should marry the woman a *second* time, after her having been in the interim married to another, because here the penalty is referred to the power he possesses of divorce, which is a consequence of marriage; and as this power is not restricted to any particular instance, but invariably accompanies every marriage, it follows that the penalty must take place upon every occurrence of the condition.

A conditional vow of divorce is not annulled by the extinction of property.

A CONDITIONAL VOW of divorce is not annulled by the extinction of the right; that is, if a man say to his wife “you are divorced, “when you enter this house,” and he afterwards give her one or two divorces, and her *Edit* be completed, the force of the vow still continues under the extinction of right occasioned by such divorce; because the condition specified, namely, her entrance into the house, has not yet been accomplished, and therefore still continues to exist; and the penalty remains, because of the continuance of its subject; wherefore the vow also continues: thus, if the condition take place during the *existence* of right, the vow is accomplished, and divorce takes place, because of the occurrence of the condition, and because the subject is liable to the penalty; and if it occur under the *extinction* of right, as above, the vow is done away, on account of the condition having occurred: but no divorce takes place, because in this case the woman is not a subject of divorce; for a subject of divorce is a woman who is a property according to the right of marriage.

Case of a dispute between the parties concerning the occurrence of the condition;

IF a husband and wife differ concerning the condition, the former asserting that it had not yet occurred, and the latter that it had, the declaration of the husband is to be credited, unless the woman produce proof in support of her allegation, because the husband is as the defendant, denying the existence of divorce, and the consequent extinction of his right; whereas the wife is as the plaintiff, affirming it.

This relates to a case where the condition is of such a nature that its occurrence may be ascertained by other means than by the testimony of the wife herself; but if it be of such nature that no evidence but her own is competent to the ascertaining of the condition, her declaration is to be credited in preference to that of her husband. This, however, holds with respect to herself only, and not with respect to any other woman; for if a man say to his wife “upon the “coming on of your courses you are divorced,—and also such an one “my other wife,” and the woman afterwards declare her menstruation to have commenced, divorce takes place upon *her* only, and not upon the *other* wife. This proceeds upon a favourable construction.—Analogy would suggest that divorce does not take place upon her either, because she is in this case in the character of plaintiff, affirming the occurrence of the condition, and the consequent divorce, and the husband is as the defendant, denying; and the declaration of a plaintiff is not to be credited but upon proof; but the reason for the more favourable construction of the law in this instance, is that the woman is inquisitor with respect to herself, as the occurrence of her courses cannot be known but through her; and hence her declaration is credited on this occasion as well as in cases of *Edit*, or of carnal conjunction; that is to say, if a woman, having been divorced, should declare that “her *Edit* having passed, she had then been married to a “man, who having duly consummated, had then divorced her, and “that her *Edit* from that husband had also elapsed,”—this her declaration is credited, so as to render her lawful in marriage to her first husband; and in the same manner the declaration of the wife is credited with respect to herself in the present instance; but it is not so with respect to the *other* wife, because this one is only in the character of a *witness* with respect to the other, and the declaration of a single witness is not to be credited, especially where she is liable to suspicion, which must be the case in the present instance, on account of the enmity subsisting between her and the other from the latter being her

her *Zirra*, or fellow-wife; whence her declaration respecting such an one is not credited.

IN the same manner, if a man say to his wife “if you be desirous “that God should torment you with hell fire, you are divorced, and “this my slave is free,” and she reply “I am desirous of such torment,” or if he should say “if you love me you are under divorce, “and this my other wife along with you,” and she reply “I love “you,” in both cases divorce takes place upon the woman who is addressed in these terms; but the slave is not emancipated in the *former* instance, nor is the fellow-wife repudiated in the *latter*, for the reasons mentioned in the preceding case.

OBJECTION.—It would appear that divorce ought not to take place in the former of these instances, as the falsehood of the woman's reply is evident, since no one can be supposed desirous of *hell fire*.

REPLY.—The falsehood is not certain, as it is possible that her hatred of her husband may be sufficiently violent to induce her to wish for a release from him at the expense even of infernal torments. But notwithstanding that the penalty, (to wit, divorce,) be annexed to her reply, with respect to this woman, although she speak falsely; yet, with respect to the *other* person who is named, divorce or manumission are not so annexed, and consequently that person is unaffected by it.

Rule in case
of divorce
suspended
upon the
courses.

IF a husband suspend divorce upon the coming of his wife's courses, saying “upon the coming of your courses you are divorced,” and she afterwards perceive the signs of the menstrual discharge, the divorce does not take place until the discharge shall have continued for *three days*, as that which terminates within a less time is not a regular discharge; but where the discharge has continued

tinued for *three days*, divorce is decreed from the period of its commencement.

BUT if a man say to his wife “ you are divorced upon *one term* of “ your courses,” she is not repudiated until she become clean from her next succeeding courses, and her *Tobr*, or term of purity, arrive; because by *one term* of the courses is to be understood a complete menstruation, and menstruation is not completed until the return of the term of purity.

AND if he say to her “ you are divorced when you fast a day,” she becomes divorced on the sunset of the first day on which she fasts: but if he only say “ you are divorced when you *fast*,” her divorce takes place from the first time that she begins a fast.—The proofs are drawn on this occasion from the term of those expressions in the original idiom.

IF a man say to his pregnant wife “ if you bring forth a male child you are divorced *once*, and if a female *twice*,” and she should happen to produce twins, a son and a daughter, and it be unknown which of them was first born, the *Kāzee* is here to decree a single divorce; but caution dictates that it be regarded as *two* divorces.—In this case the woman’s *Edit*, or term of probation, is accomplished by her delivery; for if she brought forth the *son* first, a single divorce would take place, and her *Edit* would be accomplished by the birth of the daughter, after which no other divorce could take place on account of the birth of the latter, as the accomplishment of the mother’s *Edit* includes a complete dissolution of her marriage, under which divorce cannot take place; and, on the other hand, if she brought forth the *daughter* first, two divorces take place, and her *Edit* is accomplished by the birth of the son, after which no other divorce could take place, for the same reason; hence, in the first instance, *one* divorce only would take place, and in the second *two* divorces; but in the

the present case the second divorce is not decreed, on account of the doubt in which the matter is involved; yet (as was already observed) caution dictates that this be considered as amounting to *two* divorces.

Cases of divorce suspended upon acts which admit of frequent repetition.

* If a man say to his wife “ if you converse with *Zeyd* and *Amroo*, “ you are under three divorces,” and he afterwards give her a single divorce, and she become separated by the accomplishment of her *Edit*, and she then converse with *Zeyd*, and afterwards again marry her former husband, and then converse again with *Amroo*, she falls under two divorces together with the first.—In all three divorces,—*Ziffer* maintains that on this occasion no divorce whatever takes place.—This case may be considered in four different views:—FIRST, where both the conditions appear, to wit, converse with both *Zeyd* and *Amroo* *within* marriage, in which case divorce would follow evidently;—SECONDLY, where both conditions appear *without* marriage, in which case divorce does not take place, the reason of which is also evident;—THIRDLY, where the first condition exists *within* marriage and the second *without* †, in which case likewise divorce does not take place, as that penalty cannot follow without the existence of the marriage;—and FOURTHLY, where the first condition exists *without* the marriage, and the second *within* it ‡;—and this is the case concerning

* In this and the succeeding passages a matter must be adverted to which it is necessary to understand, in order that their sense may be fully comprehended.—When a man pronounces two or three conditional divorces, these remain so far in force that they recur upon the recurrence of the condition, even after an intervening marriage; but any divorce by which that marriage may have been dissolved is then counted in with that which thus recurs upon the recurrence of the condition.

† That is to say, where the first occurs within the first marriage and the second immediately between the dissolution of that and the commencement of the second marriage.

‡ That is to say, where the *first* occurs intermediately between the dissolution of the *first* marriage, and the commencement of the *second*, and the *second* within the *second* marriage.

which

which *Ziffer* differs from our doctors.—The argument of *Ziffer* is, that as the existence of marriage is conditional to the divorce taking place at the time of the occurrence of the *last* condition, so it is in the same manner conditional at the time of the occurrence of the *first* condition, because they are both (with respect to the rule of divorce) as *one thing*, since that divorce cannot possibly take place without the concurrence of both of them.—To this our doctors reply that the case now under consideration is a *vow*, which, being an act affecting the maker of it, rests upon his competency; now the existence of marriage, at the period of suspension, (that is, of making the vow,) is made conditional, in order that the penalty may to a certainty ensue at the period of the conditions specified taking place: and, in the present case, marriage actually existing at the period of suspension, the vow holds good; and the existence of marriage is also rendered conditional at the time of the condition being completely fulfilled, in order that the penalty may take place *within* marriage; because this penalty is *divorce*, which cannot take place but within marriage: but, in the present case, the time of the occurrence of the first condition is neither a period within which the vow has any force, nor in which the penalty can take place; wherefore that interval is considered merely *as the time of the continuance of the vow*, to which the existence of marriage is not absolutely necessary, as it depends upon the vower, a vow being an act peculiarly affecting the maker of it, as was already remarked.

* IF a man say to his wife “if you enter this house you are under “three divorces,” and he afterwards repudiate her by two express divorces, and her *Edit* be fulfilled; and she be afterwards married to another man, and he have carnal connexion with her, and divorce her; and she be then married to her first husband, and after that

Case of a man first procuring a conditional divorce and then repudiating his wife by two express divorces;

* This and the following are termed *cases of obliteration*. They are more fully treated of under the article *Aila*.

enter the said house, three divorces take place upon her, according to the two *Elders**.—*Mohammed* says that no more can take effect upon her than the one divorce remaining after the two which she had already received, as above; and such also is the opinion of *Ziffer*.—The foundation of this difference, in point of doctrine, is that the two divorces are held, by the *Elders*, to have been entirely annihilated by the circumstances of the intervening marriage, and hence the first husband still continues empowered with respect to the three divorces [conditionally declared as above] upon the woman returning to him:—contrary to *Mohammed* and *Ziffer*, who hold that they are not annihilated, and therefore that in such event he continues empowered only with respect to the remainder of the three (as shall be hereafter explained.) The effect of this difference of opinion appears in a case where a husband, having suspended *one* divorce upon the circumstance of his wife's entering a certain house, afterwards repudiates her by two divorces, and the woman, after having married another man, returns to her first husband, and then enters the house, in which case she falls under the *rigorous* prohibition, according to *Mohammed*, the two former divorces not having been annihilated by the intermediate marriage; but, in the opinion of the two *Elders*, she does not fall under the *rigorous* prohibition, as they conceive the two former divorces to have been annihilated.

or by three
express di-
vorces.

If a man say to his wife “ you are under three divorces if you “ enter this house,” and he afterwards repudiate her by three express divorces, and she marry another man upon the expiration of her *Edit*, and, after being divorced by him, be again married to her former husband, and then enter the said house, no effect whatever ensues.—*Ziffer* says that three divorces take place, because three divorces are suspended generally upon the condition, whether in virtue of the right from the present existing marriage, or of that which recurs after the

* *Haneefa* and *Abou Yoosaf*.

intervening

intervening marriage with another; and the expression is *general*, and not *restrictive*; hence therefore the occurrence of the three suspended divorces may still be conceived possible after the three divorces before given; for which reason the vow also continues in force, as the permanence of that is implied in the possibility of such occurrence.—The argument of our doctors is that the penalty does not consist of three divorces *generally*, but of the three *suspended* divorces, with respect to which the husband is authorized, in virtue of the present existence of marriage, because he has imposed the vow upon himself for the purpose of determent, and it is only the three divorces therein mentioned which can operate in that way, not those with respect to which he may be authorized by a subsequent marriage, an event the occurrence of which is not probable, the chances being so much against it; and the penalty consisting of those three particular divorces being done away by the three divorces, (in consequence of which the subject of divorce no longer remains,) the vow is also done away: but it would be otherwise if, after a vow expressed as above, the husband were to repudiate his wife by a *single irreversible* divorce, for there the vow remains in force, because of the permanence of its subject*.

If a man say to his wife “when I have carnal connexion with you, you are under three divorces,” and he afterwards have carnal knowledge of her, divorce takes place upon the instant of such carnal connexion taking place; and here, although he should not immediately cease such connexion, yet he does not become liable for either a fine* or a proper dower; but the fine or dower becomes obligatory upon him if, after the shortest cessation, he should *again* have carnal connexion with her.—This is analogous to a vow made with respect to a female slave; for if a master say to his female slave “when I

Case of divorce suspended upon carnal connexion with the wife.

* The subject still remains, because, after a *single* divorce, a wife continues a legal subject of two other divorces, until the expiration of her *Edit.*

† Meaning the *Akir*, or fine of *trespasses*.

“ have carnal connexion with you, you are free,” and he afterwards have carnal knowledge of her, she is emancipated on the instant of such connexion; yet she has no claim to a fine, although he should not immediately cease; but if, after a cessation, he again renew the connexion, she has then a claim to a fine.—This is the doctrine of the *Zâbir-Rawâyet*.—It is recorded from *Aboo Yoosaf* that a fine is due where he delays, although he should not entirely retreat and again renew the connexion, because this amounts to carnal conjunction after divorce or emancipation, on account of his continuing the act; but punishment is not due, since the whole is only *one act*, in which, as the *commencement* affords no cause for punishment, so neither is punishment incurred by the *accomplishment* of it; but yet the fine is incumbent, as the commission of the carnal act upon a prohibited subject cannot be free from both punishment and fine. The grounds on which the *Zâbir-Rawâyet* determines in this case, is that by *Jama* [the carnal act] is understood *the commencement of the act*; and *continuation* is not commencement; wherefore carnal connexion *de novo* is not implied: contrary to a case of cessation and renewal, because in that case the connexion takes place after divorce; but yet, even in this instance, punishment is not incurred, on account of the doubt occasioned by the unity of place and of passion; but, such being the case, the fine is incumbent, as the commission of the carnal act upon a prohibited subject cannot be free both from punishment and fine.

If, moreover, in the case now recited, the husband had suspended a reversible decree upon his commission of the carnal act, the divorce is virtually reversed by his delay, agreeably to *Aboo Yoosaf*; but if he cease and again renew, it is then reversed, according to all the doctors.

S E C T I O N.

Of ISTISNÂ; *that is*, RESERVATION or EXCEPTION.

IF a man say to his wife "you are divorced (adding) *if it please God*," without any stop between, divorce does not take place, because the prophet has said "*where a man makes a vow of divorce or manumission, saying, IF IT PLEASE GOD, he cannot be forsworn*;" and also, because the husband has here introduced the words "*if it please God*" in the form of a condition, and hence the divorce is suspended upon the will of God, and does not take place until the occurrence of the condition: but, the will of God not being known, nothing can be decreed which is suspended upon it.—And here, as the suspension destroys the effect of the preceding words, it is a condition that the same follow them *connectedly*, and without pause, as in other similar cases: and the words "*if it please God*" are here said to be introduced in *the form* of a condition, because they are not *actually* conditional, as by a condition is understood a thing not at present existing, but the future occurrence of which is conceivable; wherefore a thing now existing cannot be termed a *condition*; nor a thing the existence of which is impossible; and the will of God is of one or other of these descriptions.

Divorce, with a reservation of the will of God, does not take place,

WHAT is here said proceeds upon a supposition that the words "*if it please God*" follow the preceding words immediately, and *without* separation, by a pause; but if the man should first say "you are divorced," and remain a moment or two silent, and then say "*if it please God*," the virtue of the former words is established, because in that case the additional words come in as a retraction from the first words which is not held legal.

unless it be pronounced with a *pause* between the divorce and the reservation.

IF

If a man say to his wife “you are divorced, *if it please God*,” and she die before the utterance of the latter words, divorce does not take place, because on account of the reservation “*if it please God*,” the words preceding do not stand or operate as a desire expressed.

OBJECTION.—As death prevents divorce, that is to say, as it is on account of death that divorce cannot take place, it follows that the same circumstance in the present case precludes the words “*if it please God*” and thereby prevents them from operating to annul the first words in their effect, and thus it would appear that on account of the woman’s dying as above, the divorce should take place upon her, she not having expired until after the words “*you are divorced*,” and before the utterance of the reservation “*if it please God*.”

REPLY.—Death operates to the prevention of divorce on account of its cutting off the subject of it; but it does not prevent the effect of the reservation in the present case, as the validity of reservation depends upon that of the declaration, which rests upon the husband, who is still living: but it would be otherwise if *he* should die before having uttered the reservation, as in that case it is not added to the preceding words.

Divorce pronounced with an exception in point of number, takes place accordingly.

If a man say to his wife “you are under three divorces all but *one*,” *two* divorces take place;—and if he say “all but *two*,” *one* divorce takes place; for it is a rule that this figure of speech termed *Istisnâ*, is expressive of a remainder from the whole of a given number from which an-exception is made; and this is approved, because there is no difference whatever between a man’s saying (for example) “I owe such an one nine *Dirms*,” or “I owe such an one ten *Dirms* all but one;” wherefore this mode of speaking by the exception of a part from the whole is approved, because it amounts to a mention, simply, of what remains after the exception is made, as in the present instance.

BUT the exception of the *whole* from the *whole* is disapproved, since, after exception of the *whole*, nothing whatever remains, the mention of which might be established; and hence, if a man say to his wife “you are under three divorces *all but three*, the three divorces take place upon her, because the exception of a *whole* from a *whole* is nugatory, and therefore not admitted to have any effect.

AND here, as in the preceding cases, the exception is of no effect, unless it be immediately connected with what goes before, namely, the *sentence of divorce*.

CHAP. V.

Of the *Divorce* of the *Sick*.

IF a man, lying on his deathbed, repudiate his wife either by one irreverfible divorce, or by three divorces, and die before the expiration of her *Edit*, ſhe is ſtill intitled to her inheritance from his eſtate: but, if he ſhould not die until after the accompliſhment of her *Edit*, ſhe has no claim.—*Shafei* maintains that ſhe is not an inheritreſs in either caſe, as the matrimonial connexion, which was the cauſe of her inheritance,

A wife divorced by a dying husband inherits if he die before the expiration of her *Edit*,

* By the *Muſſulman* law, a woman, on the death of her husband, is entitled to an inheritance from his eſtate; but it is poſſible that the husband may ſometimes be induced, from perſonal diſlike, or other motive, where he finds himſelf dying, to repudiate his wife, in order to exclude her from her right of inheritance, in the event of his death; an injuſtice which the rules and cautions laid down in this chapter are intended to counteract and guard againſt: ſome of them are alſo deſigned to counteract any fraudulent colluſion between the wife and her dying husband, to the prejudice of his heirs.

is dissolved by the divorce; whence it is that if this man were to repudiate his wife by an irreverfible divorce, and ſhe were to die within her *Edit*, before the deceaſe of her huſband, the huſband does not inherit of her, the matrimonial connexion which was the cauſe of that relationship which intitled to inheritance no longer remaining.—To this our doctors reply that the matrimonial connexion at a time of a mortal illneſs is a cauſe of inheritance with reſpect to the wife; but where the huſband is deſirous of defeating this right by giving an irreverfible divorce, his intention is reſiſted, by poſtponing the effect of his ſentence of divorce to the expiration of his wife's *Edit*, in order to ſhield her from injury; and ſuch procraftination is poſſible, as a marriage is accounted ſtill to ſubſiſt during the *Edit*, with reſpect to various of its effects, ſuch as the obligations of alimony, reſidence, and ſo forth; and hence it may lawfully be accounted to continue in force with reſpect to the woman's inheritance: but, as ſoon as the *Edit* is accompliſhed, a further procraftination is impoſſible, becauſe the marriage does not then continue in any ſhape whatever.—The caſe, however, is very different where the wife happens to die before her huſband, (as mentioned by *Shaſe'i*,) for in this inſtance the connubial connexion is not a cauſe of inheritance in the huſband, (in virtue of his right as connected with her property,) becauſe ſhe was not *ſick* but in *health* at the time of his pronouncing divorce: and the connexion is diſſolved with reſpect to his right, eſpecially where he himſelf manifeſts his deſire that it ſhould be ſo, by pronouncing upon her an *irreverfible* divorce; ſince, as the connexion would be diſſolved though he were not deſirous of the annulment of his right, it follows that it is ſo where he *is* deſirous, *a fortiori*. The mode in which the connexion may be diſſolved without the conſent of the huſband is by the wife, upon her deathbed, admitting the ſon of her huſband to carnal connexion and dying within her *Edit*, in which caſe the huſband would not inherit of her, the matrimonial connexion with reſpect to him becoming null, notwithstanding he does not conſent to ſuch annulment.

IF a woman require her husband, who is sick, to repudiate her by an irreversibile divorce, and he accordingly pronounce the same upon her,—or, if he desire her to choose, and she choose herself,—or, if she procure divorce of him in the manner of *Khoola*, that is, for a compensation, and he afterwards die before the expiration of her *Edit*,—she does not inherit of him, because the only reason for postponing the effect of the divorce is a regard for her right, to the destruction of which she in this case consents.—But if she require him to repudiate her by a *reversibile* divorce, and he pronounce *three* divorces upon her, she inherits, because a reversibile divorce does not dissolve the marriage; and hence her requisition of such a divorce does not imply her consent to the destruction of her right.

unless she be divorced at her own request, or by her own option, or for a compensation.

IF a man, upon his deathbed, declare that he had repudiated his wife by three divorces, at such a time, during health, and that her *Edit* had passed, and she confirm this, and he afterwards make an acknowledgment of his being indebted to her in a certain sum, or bequeath her a legacy, she will, in the event of his decease, be entitled to that sum of the three which is the least, the *legacy*, the *debt*, or her proper inheritance;—that is to say, if her *inheritance* be of smaller amount than the *debt* or the *legacy*, it goes to her, and so of the others.—This is the doctrine of *Haneefa*.—The two disciples say that the acknowledgment or bequest are either of them legal, and therefore that the woman is entitled either to the *whole* of the acknowledged debt, or to the *entire legacy*, (provided that does not exceed the third, or devisable proportion of his property *,) as the case may be.—And if the husband, in conformity with the requisition of his wife, pronounce three divorces upon her on his deathbed, and afterwards acknowledge himself indebted to her in a certain sum, or bequeath her a legacy, she is in this case entitled to whatever is of least value, the debt, the legacy, or the *inheritance*, according to all except *Ziffer*, who says

In case of any possible collusion between the parties, by the husband, after a declared divorce, acknowledging himself indebted to her, or bequeathing her a legacy, she receives whatever may be of least value, for inheritance, debt, or legacy.

* This, which is termed *Sils Mál*, is fully explained in the Book of Wills, Vol. IV.

that she is entitled to the whole bequest, (not exceeding the third of his property,) or to the whole of the debt acknowledged, because her right to inheritance being annulled by her requisition of divorce, the obstruction to the legality of the acknowledgment or bequest (namely, the matrimonial connexion,) is removed.—The argument of the disciples, with respect to the former case, is that when the husband and wife agree respecting his having divorced her, and her *Edit* having passed, she from that period becomes a stranger to him, and he no longer remains liable to suspicion, (that is to say, in the present case, suspicion of his preferring her before his other heirs, and giving her more than her *right*, which is *inheritance*,) whence it is that his evidence to her advantage is credited; and it is also lawful for him to pay her his *Zakât*, or to marry her sister, or for her to marry another man: contrary to the *second* case, as there the *Edit* still remains unaccomplished, and the continuance of that affords ground for such suspicion: now the subject of suspicion is a circumstance as yet concealed and unknown, wherefore the *ground* for suspicion is regarded, and not the *actual fact* suspected or apprehended; and as the continuance of the *Edit* affords ground of suspicion, the effect of suspicion is established, namely, the invalidity of acknowledgment, or bequest; and hence also is established the incredibility of the evidence of husband or wife respecting each other; as well as the incredibility of evidence, in respect to relations either by blood or by marriage; since marriage and affinity are grounds of suspicion.—The argument of *Haneefa* is that suspicion exists in either instance; in the *second*, because a woman may choose divorce, in order to open to her the door of acknowledgment, or bequest, so that she may receive more than her proper inheritance; and in the *first*, because it may happen that the husband and wife may form a collusion, and agree to hold forth their separation and the completion of her *Edit*, in order that he may be enabled to favour her, by giving her more than her just inheritance; and the suspicion is confirmed where the subsequent acknowledgment or bequest appears to be of more value than the inheritance, on which account it is that such

such excess is rejected, and the rule dictates that she shall receive the smallest of the three, the *debt*, the *bequest*, or the *inheritance*.—It is here to be observed that no suspicion exists respecting the proper amount of the woman's inheritance, that being adjusted in proportion to the whole property inherited, according to established rules.—Neither are *Zakât* or *evidence* subjects of suspicion, as a husband and wife are never known to form a collusion for the purpose of enabling him to give her the *Zakât* upon his property, or to bear evidence in any matter affecting her.

IF a husband, being in a besieged town, or in an army, repudiate his wife by three divorces, she does not inherit of him, in the event of his death, although that should happen within her *Edit*:—but if a man engaged in fight, or a criminal carrying to execution, were in such situation to pronounce three divorces upon his wife, she inherits where he dies in that way, or is slain; for it is a rule that the wife of a *Fâar*, (or *Evader* *,) inherits of him, upon a favourable construction of the law; and his evasion cannot be established but where her right is inseparably connected with his property, which is not the case, unless he be [at the time of pronouncing divorce] sick of a *dangerous* illness, (appearing from his being *confined to his bed*, and other symptoms,) or in such other situation as affords room to apprehend his death: but it is not established where he pronounces divorce in a situation in which his *safety* is more probable than his *destruction*:—thus, a man who is in a fort or town besieged, or one who resides in an *army*, cannot be said to be in any *imminent* danger, the former of these situations being designed for security against the enemy, and the latter to repel his attacks;—whereas one engaged in fight, or carrying to execution, is in circumstances of *imminent* danger; and consequently the evasion is

Divorce pronounced in a situation of danger cuts off the wife from her inheritance, unless the danger be *imminent* or *certain*.

* Meaning one who endeavours unjustly to defraud his wife of her right, or by some means to deprive her of it, that is, (accommodating the explanation to the term used in the text,) one who flies from or evades rendering his wife her right.

established in the *latter* circumstance, but not in the *former*.—There are various cases recorded corresponding with these at present recited, and which proceed upon the same rules.—It is to be observed, however, that what is here said, *viz.* “where he dies that way, or is slain,” shews that there is no essential difference between the two cases, where he dies in the way mentioned, or in any other way, the same as a husband confined to a sick bed, who happens to be slain.

A conditional divorce pronounced in sickness, does not cut off the wife from her inheritance, unless the condition be her own act;

IF a man, being in health, say to his wife “when the first of such a month arrives”—(or)—“when you enter this house”—(or)—“when such an one repeats evening prayers”—(or)—“when such an one enters this house,”—“you are under divorce,” and the thing mentioned take place at a time when he is *sick*, she does not inherit of him:—but if he were to make such a condition upon his deathbed, she inherits in all these cases except one, namely, “when you enter this house.”—It is to be observed that the suspensions now treated of are of four different kinds;—FIRST, where divorce is suspended upon the arrival of a specified time;—SECONDLY, where it is suspended upon the act of a stranger;—THIRDLY, where it is suspended upon the act of the husband himself;—and FOURTHLY, where it is suspended upon the act of the woman; and each of these again are of two descriptions; *one*, where the suspension is declared in health, and the condition occurs in sickness; the *other*, where both take place in sickness. In the two *first* instances, namely, where the husband suspends the divorce upon the arrival of a specified time, by saying “when the first of such a month arrives you are under divorce,” or where he suspends it upon the act of a stranger, by saying “when such an one enters the house,” (or) “when such an one repeats evening prayers,” if the suspension and the condition both occur in sickness, the woman is entitled to inherit of her husband, because his intention here appears to be evasion, from the circumstance of his suspending divorce at a time when the wife’s right is inseparably connected with his property: but if the *suspension* take place in *health*, and the *condition* in *sickness*,

sickness, the woman does not inherit of him.—*Ziffer* says that in this last case also she inherits, because whatever is suspended upon a condition takes place on the occurrence of that condition, and is then like the fulfilment of a promise; and also, because in this case divorce occurs during *sickness*.—The argument of our doctors is that the antecedent suspension induces divorce at the time of the occurrence of the condition *consequently*, but not *designedly*, and injury is not established but from *design*; the act of the husband, therefore, is not to be set aside by the annulment of its effect, namely, *non-inheritance*.—And, in the *third* instance, (that is, where the husband suspends the divorce upon his own act,) he is considered as an *Evader*, and the woman inherits of him, whether the suspension take place in health, and the condition in sickness, or both occur in sickness; and also, whether the act be of an avoidable or an unavoidable nature; the reason of which is, that the husband on this occasion evidently designs to defeat his wife's right, whether by the *suspension*, or by producing the condition during a mortal illness.

OBJECTION.—It would seem that the husband is not an evader where the condition is an act of an *unavoidable* nature.

REPLY.—In the case now under consideration, although the act of condition be unavoidable by him, yet it is in his power to avoid the suspension of divorce upon that act, and hence his act is set aside, in order that the woman may not be injured.—And in the *fourth* instance, (that is, where the husband suspends divorce upon an act of the wife,) if the suspension and condition both occur in sickness, and the act be of such a nature as may be avoided by the woman, (such as speaking to *Zeyd*, for instance,) she does not inherit, as she in this case consents to the divorce; but if the act be of a nature unavoidable by her, (such as *eating* and *drinking*, or *prayer*, or *conversing with her parents*,) she is entitled to inherit of her husband, as she is compelled to the performance of such acts, since, if she were *not* to perform them, there is fear of her perishing either in this world or the next; and consent cannot exist where she acts from unavoidable necessity; but

provided that
act be of an
avoidable
nature.

but if the suspension take place in *health*, and the condition in *sickness*, and the act be of a nature *avoidable* by the woman, she does not inherit, for evident reasons. And where the act is of an *unavoidable* nature, the rule is the same, with *Mohammed* and *Ziffer*, (that is, she does not inherit,) because, on this occasion, no act appears on the part of the husband, after the connexion of the wife's right with his property.—With the two *Elders*, on the contrary, she does inherit, because the husband in this case obliges her to the commission of that act, and for that reason the act becomes his own, she being only as his instrument; as in a case of compulsion, a compellee being one who is straitened between two things, in which predicament the wife here stands, since, if she perform the act of condition, she sustains the injury of divorce, and if she refrain she is in danger of perishing either here or hereafter.

Where recovery intervenes between a sickbed divorce and the death of the husband, the wife is cut off from inheritance;

If a man pronounce upon his wife three divorces in sickness, and afterwards recover his health, but happen to die before the expiration of her *Edit*, she does not inherit.—*Ziffer* says that she inherits, because the husband in this case appears to have intended evasion; but to this our doctors reply that the sickness in which divorce was pronounced having been removed by the intermediate recovery of health, the last sickness, which follows, is the same as *health*, whence it appears that her right is not connected with his property, and therefore the husband is not an evader in divorcing her.

and so also where her apostacy intervenes;

but not where her incest intervenes.

If a sick person pronounce three divorces upon his wife, and she afterwards apostatize from the faith, and again return to it, and the husband then die before the expiration of her *Edit*, she does not inherit of him: if, however, she were *not* to apostatize, but should admit the son of her husband to carnal connexion, she inherits.—The difference between those two cases is, that by apostacy her capacity

capacity of inheritance is destroyed; whereas, by admitting the son of her husband to the commission of the carnal act it is not so, for although this renders her prohibited to her husband, yet it does not forbid her competency of inheritance, since prohibition and inheritance may be united in the same person, (as, for instance, in a *mother* or a *sister*,) wherefore she inherits in this case: but it would be different, if she were to admit the son of her husband to carnal connexion during the existence of marriage, because separation is the consequence, whence it appears that she consents to the destruction of the matrimonial connexion, which is the occasion of her inheritance, whereas, if she admit the son of her husband to carnal connexion after the latter having pronounced *three* divorces upon her, prohibition is not established by that act as it had been already established by divorce.

If a man, being in health, slander his wife, that is, accuse her of adultery, and afterwards make asseveration respecting the same on his deathbed, she inherits of him.—*Mohammed* says that she does not inherit: but if the slander be also declared upon his deathbed, she inherits, according to all our doctors.—The reason of this is that the slander amounts to the suspension of divorce upon a thing unavoidable by the woman, as it constrains her to opposition*, that she may remove from herself the scandal of the imputation.

Divorce occasioned by the slander of a dying husband does not cut off his wife from her inheritance;

If a man make an *Ajla* †, or vow of abstinence, from his wife, during health, and she become divorced, in consequence of it when he is upon his deathbed, she does not inherit of him; because *Aila* is a vow of abstinence, from carnal connexion with her for the space

and so, also, of a death-bed divorce occasioned by an *Aila*.

* That is to say, forces her to require her husband to verify his accusation by a *Laân*, or *solemn asseveration*, before the magistrate, which, if he does so, occasions divorce.—For a full explanation of this see Chap. X. treating of *Laân*.

† See Chap. VII.

of four months, which at the end of that period occasions divorce, and hence it amounts to a suspension of divorce upon the arrival of a specified time, being the same as if he had said to her “upon the lapse of *four months*, if I have not carnal connexion with you “within that period, you are divorced;” which was already explained.

Where a deathbed divorce is *reversible*, the wife inherits in every case.

If a man upon his deathbed repudiate his wife by a *reversible* divorce, she inherits of him in all the cases here recited, because the marriage is not finally dissolved, since it continues lawful for him to have carnal connexion with her; and such being the case, the principle upon which she inherits stands still unimpeached.

Note.—In all these cases where it is said that *the wife inherits*, it means, “in case of the decease of the husband, before the expiration of her Edit,”—the reason of which has been already mentioned

CHAP. VI.

Of *Rijaât*, or returning to a divorced *Wife*.

RIJAÂT in its primitive sense means *restitution*; in law it signifies a husband returning to, or receiving back, his wife after divorce, and restoring her to her former situation, in which she was not liable to separation from the passing of her courses, or of the space of time corresponding with their periods, and which she recovers by *Rijaât*; this is the definition of it in the *Jama Ramooz*: from what occurs respecting it in the present work, it appears simply to mean *the continuance of marriage*.

Definition of
Rijaât.

If a man give his wife one or two divorces reversible, he may take her back any time before the expiration of her *Edit*, whether she be desirous or not, God having said in the *Koran* “YE MAY RETAIN
“THEM WITH HUMANITY,” where no distinction is made with respect to the wife’s pleasure, or otherwise; and by the word *retain* is here understood *Rijaât*, or *returning to*, according to all the commentators.

A man may
return to a
wife repudi-
ated by one
or two rever-
sible divorces,

THE existence of the *Edit* is a condition of *Rijaât*, because by *Rijaât* is understood a continuance of the marriage, (whence the term *retain* is applied to it,) and this cannot be established but during the *Edit*, since after *that* is past the marriage no longer remains.

provided he
do so before
the expira-
tion of her
Edit.

Rijaât is of
two kinds;
*expres*s, and
implied.

RIJAÂT is of two species; the FIRST is termed *expres*s, where the husband says, for example, “ I have returned to, (or taken back,) “ my wife,” or addresses the same to her personally; and the SECOND *implied*, where [he has carnal connexion, or takes conjugal liberties with her, such as viewing those parts of her which are usually concealed, and so forth.—This second description of *Rijaât* is according to our doctors. *Shafeï* says that the *Rijaât* is not approved, or regular, but where it is expressly pronounced by the husband, (provided he be able to speak,) because *Rijaât* stands as a marriage *de novo*; and (according to him) carnal connexion with the wife is in this case prohibited, on account of its legality having been annulled by the divorce, which is a dissolver of marriage, for it would appear that the marriage is itself dissolved by a divorce, although it be of the reversible kind, were it not that the law there leaves to the husband an option of *Rijaât*, which is the sole reason why he confines its effect to the prohibition of carnal connexion, and does not extend it to a dissolution of the marriage itself.—The argument of our doctors is that by *Rijaât* is understood a continuance of the marriage, as was before explained; and this may be shewn by an *act*, as well as by *words*, for *acts* sometimes evince *continuance*; as in the case of abolishing the option of a feller; that is to say, in the same manner as the abolition of the option of a feller (which is the continuance of property) is proved by an *act*, so also in the present case; now acts peculiar to marriage are signs of the continuance of it; and the carnal connexion, or other acts, as before stated, are peculiar to marriage, especially in the case of free women, since, with respect to *them*, they cannot be lawful but through marriage,—and, with respect to female slaves, they are sometimes lawful by right of marriage, and sometimes by right of possession: contrary to *touching*, or *looking* at the *pudenda* of a woman, *without* lust, because that is sometimes lawful without marriage, as in the case of a *physician* or *midwife*; and the sight of *other* parts than the *pudenda* sometimes happens to people who reside together; and as a wife resides with her husband during her *Edit*, if such an accident were

were to imply *Rijaât*, he might then give her another divorce, to her injury, as it would protract her *Edit*.

It is laudable that the husband have two witnesses to bear evidence to his *Rijaât*; yet if he have *no* witnesses the *Rijaât* is nevertheless legal, according to one opinion of *Shafeï*.—*Mâlik* holds that it is not lawful without witnesses, God having so commanded, saying, in the *Koran*, “RETAIN THEM WITH HUMANITY, OR DISMISS THEM “WITH KINDNESS, AND TAKE THE EVIDENCE OF TWO WITNESSES “OF YOUR OWN PEOPLE, AND SUCH AS ARE OF JUST REPUTE;”—where, the imperative being of *injunctive* import, the taking of evidence appears to be *incumbent*.—To this our doctors reply that in all the texts which occur concerning *Rijaât*, it is mentioned *generally*, and not under any restriction of being witnessed; moreover, by *Rijaât* is to be understood (as was before stated) the *continuance* of marriage, to which evidence is not a necessary condition; as in a case of *Aila*, for instance, where it (the *Aila* or *vow of abstinence*) is done away by the carnal act, to which there are no witnesses:—but yet the taking evidence to *Rijaât* is *laudable*, for the greater caution, so as to put it out of the power of any person to contradict it.—With respect to the sacred text quoted by *Mâlik*, the *imperative* is to be taken, *not* in an *injunctive*, but in a *recommendatory* sense; for in this instance *retaining* them, and *separating* from them, are connected by the intermediate particle “OR,” the text saying “RETAIN THEM, *or* DISMISS THEM, AND TAKE TWO WITNESSES, &c.” from which it appears that the calling witnesses is *laudable* only, and not *injunctive*, in the present case, because, in *separation*, it is held to be *laudable* only, by all the doctors.

The evidence of witnesses to *Rijaât* laudable, but not incumbent.

It is also laudable that the husband give his wife previous information of his intention of *Rijaât*, lest she fall into sin; for, if she be not aware of his intention, it is possible that she may marry another husband after the accomplishment of her *Edit*, and that he may have

the wife should have due notice of it.

carnal connexion with her by an invalid marriage, which is prohibited.

A declaration of previous *Rijaât*, made after the expiration of the *Edit*, is to be credited, where both parties agree in it;

If, after the accomplishment of the woman's *Edit*, her husband were to declare that he had taken her back, before the expiration of it, and she confirm this, *Rijaât* is established: but if she deny the fact, her declaration is credited, because the husband in this case pretends to have performed an act which is not at present in his power, and his declaration is therefore liable to suspicion, and is not to be credited unless that be removed by the woman's confirmation.—It is to be observed that the *oath* of the woman (according to *Haneefa*) is not necessary.—This is one of the six cases of *Isthillâf**, which are discussed at large in the Book of Marriage.

but not when they disagree.

If a man, having repudiated his wife by a reversible divorce, afterwards say to her “I take you back,” and she reply “my *Edit* is past,” the *Rijaât* is not valid, according to *Haneefa*.—The two disciples say that it is valid, because it occurs within the *Edit*, that being accounted to continue until the woman gives notice of its completion; and in this case the *Rijaât* takes place before such notice; hence also it is that if the husband say to her “I have divorced you,” and she reply “my *Edit* is passed,” still divorce takes place.—The argument of *Haneefa* is that the *Rijaât* appears to occur after the completion of the *Edit*, because the wife is trustee with respect to her declaration of her *Edit* being completed:—and as to the case of divorce cited by the two disciples, it is not admitted by *Haneefa*, for divorce in such a circumstance, according to his opinion, would not take place:—admitting however that it *did* take place, it may be replied that divorce takes place from the declaration of the husband, after the completion of the *Edit*, (by his saying “that he had divorced her during

* Cases treating of the necessity of a wife's confirming any question respecting her marriage by oath.

“ her

“her *Edit*,”) because this is a *severity** upon *himself*, and may therefore be allowed credit: contrary to *returning* to a wife, as that cannot be established by a declaration made after the expiration of the *Edit*, since such declaration affects another person.

If the husband of a female slave, after her *Edit* is past, declare that he had taken her back during her *Edit*, and her owner confirm his declaration, but she herself deny it, she is to be credited, according to *Haneefa*. The two disciples say that the confirmation of her owner is to be credited, because her person is his property, and hence he makes a declaration in favour of the husband, respecting a thing which is his particular right; this, therefore, is analogous to a case where a master makes a declaration concerning his slave's marriage;—that is to say, if a man assert that he had married the female slave of such an one after the expiration of her *Edit*, she *denying* and her master *confirming* his assertion, the declaration of the master is to be credited in preference to that of the slave; and so likewise in the case in question.—To this our doctors reply that the efficiency of *Rijaát* is founded upon the *Edit*, because, if that still exist, the former is good and valid, but not otherwise; and as the declaration of the female slave is to be regarded concerning her *Edit*, it must in the same manner be regarded with respect to what is founded upon it. But if the above case be reversed,—that is, if the slave confirm and the owner deny the husband's assertion,—the denial of the owner is to be credited, according to the two disciples, (and also according to *Haneefa*, in the *Ra-wâyet-Sabeeh*,) because her *Edit* no longer remains, and the right to the *Matât*, or *present* †, rests with her owner; wherefore her assertion is not to be credited to the prejudice of her master's right, as she is in this case liable to suspicion:—contrary to the *former* case, in

The declaration of a wife who is a *slave* must be credited respecting the termination of her *Edit*.

* Because (if she had been before under *two* sentences of divorce) this is a *third* sentence, which repudiates her from him by the *rigorous prohibition*.

† See Book II. Chap. III.

which

which the owner, by confirming the assertion of the husband, acknowledges the continuance of *Edit* at the period of *Rijaât*; and supposing this to be the case, his [the owner's] authority disappears; his right, therefore, is not injured by her denial, and hence that is to be credited.—If, however, in this case the female slave assert that her *Edit* is past, and the husband and owner unite in saying that it is *not* past, her assertion is to be credited, she being trustee with respect to what she says, as having sole information upon the point in dispute.

At what time
the power of
Rijaât ter-
minates.

WHEN the menstrual discharge, in the third courses after divorce, continues for ten days, or upwards, the power of *Rijaât* terminates upon the stoppage, although the woman should not yet have performed her customary ablutions: but if it stop within less than ten days, the power of *Rijaât* does not terminate till such time as the ablutions are performed, or the hour of prayer is past. The reason of this is that a menstruation is not accounted to exceed the space of ten days, and hence the woman's purification is understood on the instant of the stoppage, at any time beyond that period; and the power of *Rijaât* consequently terminates; whereas, when it stops *within* that period, it is possible that it may still return, and hence her purification cannot be finally determined until the customary ceremonies of ablution, &c. are performed.—What is now advanced applies to the case of *Mussulman* women only; but with *Kitabees* the power of *Rijaât* terminates on the instant of stoppage of the menstrual discharge in the third courses after divorce, although it should happen *within* ten days, because with such women no other sign is requisite to establish purification than the simple *cessation*, as they are not held, by our doctors, to be subject to the injunction of the law in this particular.

THE power of *Rijaât* terminates where the woman performs the
teyummim,

*teyummim**, and repeats the usual prayers, according to *Haneefa* and *Aboo Yoosaf*.—This proceeds upon a favourable construction of the law.—*Mohammed* says that it terminates immediately upon the performance of *teyummim*; and this opinion is conformable to analogy, because the *teyummim*, where water is not to be had, stands as a purification, having the same virtue with ablution, as being a substitute for it.—The argument of *Haneefa* and *Aboo Yoosaf* is that sand or dust is rather a *defiler* than a *purifier*, as it *soils* the body, and the latter even adheres to it; and rubbing the body therewith is admitted to be a purification from necessity only; but this necessity does not absolutely exist until the proper hour of prayer arrives; and that which is established through *necessity* is restricted in its virtue to the particular point which occasions the necessity; and hence the *teyummim* is regarded with respect to *prayer* only, and not with respect to the termination of the *Edit*.—Some doctors have delivered it as the opinion of the two *Elders*, that the power of *Rijaât* terminates upon the *commencement* of prayer: others say that it does not terminate until the *conclusion*, in order that the rule respecting the repetition of prayer may be fulfilled.

WHERE the woman, in performing ablution, omits any part of her person, if it be a *complete limb*, (such as the *hand* or *foot*, for instance,) or more, the power of *Rijaât* does not terminate†: but if

* According to the *Mussulman* law, no religious act can be performed without a previous purification, by *ablution*, where water is to be had, or, in defect of water, by *teyummim*, that is, rubbing the hands, face, and other parts of the body, with sand or dust. A woman, while in a state of impurity, is incapable of any religious act; and hence this formal purification is requisite upon the stoppage of the menstrual discharge. The point upon which the case here considered turns is whether, as the *teyummim* is only a substitute for ablution, the power of *Rijaât* continues until her repetition of prayer, or whether it terminates immediately upon the performance of that act.

† That is, as the ablution is in this case *incomplete*, the power of *Rijaât* does not terminate until *prayer*; but when *that* is repeated, it terminates of course,—the woman's purification being then fully ascertained.

the part omitted be less than a *limb* (a *finger*, for instance) it terminates.—The compiler of the *Hedaya* observes that this rule proceeds upon a favourable construction of the law; for analogy would dictate, in this case, that if a complete limb be through forgetfulness omitted, the power of *Rijaât* discontinues, because the woman has performed the ablution upon the greatest number of her limbs, and the rule of the *whole* applies to the *greatest number*; whereas, on the other hand, in the omission of any part *short* of a complete limb, it would suggest that the power of *Rijaât* still remains, because the laws respecting *Janâyat* and the courses do not admit of division, and hence, where the power of *Rijaât* remains with respect to a *part*, it continues with respect to *the whole*, as in the liberty of prayer, for instance; in short, analogy requires that the rule be the same in both cases: but the reason for a more favourable construction is that there is an essential difference in the two cases, because any part *short* of a complete limb soon becomes dry, especially in hot weather, and hence it is not certain but that part may have undergone ablution together with the rest, for which reason it is here said that the *Rijaât* terminates; whereas a *complete* limb does not quickly become dry; neither can the omission of so large a portion of the person, in ablution, be ascribed to *forgetfulness*. It is recorded from *Aboo Yoosaf* that the omission of ablution with respect to the mouth or nostrils is the same, as with respect to a complete limb; but it is elsewhere recorded from him that these stand the same as any part *short* of a complete limb, (and of this opinion is *Mohammed*,) because there is a difference of opinion concerning the divine injunction directing the ablution of those parts.

A husband
may take

* IF a man divorce a wife who is pregnant, or who has brought forth

* To understand the scope of this case, it is requisite to advert to one of the fundamental laws of divorce,—that a divorce pronounced upon a woman with whom the husband has not had carnal connexion is, in all cases, irreversible. The case here considered supposes

forth a child, and declare that he has never had carnal connexion with her, he is nevertheless at liberty to take her back, because where the pregnancy appears within such time as renders it possible to be derived from him, to him it is to be ascribed; and this circumstance proves his connexion with her, whence a right of *Rijaât* is established in him, as the divorce thus appears to be reversible; and in the same manner, where the parentage of the child born of her is established in him, his connexion with her is also established; and it thus appearing that she has been enjoyed by him, the divorce is consequently reversible; and his declaration is in either case null, as the law denies it, because, by ascribing the woman's pregnancy, or the birth of the child, to the carnal act of the husband, it establishes her marriage, and consequently his right of *Rijaât*, *a fortiori*.—It is to be observed that by the husband divorcing a wife who has brought forth a child is here meant *divorce after delivery*; for if the child were born after the divorce, the *Edit* would be thereby accomplished, and the power of *Rijaât* would terminate of course.

back an un-
enjoyed di-
vorced wife,
provided she
be delivered
of a child
within such a
time as esta-
blishes its
parentage in
him.

If a man retire with his wife in such a way as amounts to a *Khalwat Sabeeh*, and afterwards divorce her, declaring that he has not had carnal connexion, he has no power of *Rijaât*, because that would have been confirmed to him by his commission of the carnal act; but he acknowledges that this has not taken place, and hence his declaration is credited, as it operates to the prejudice of his right; and the law does not on this occasion deny his declaration, because a woman's right to her stipulated dower is founded upon her making delivery of her person, and not upon her husband's seizure of it: contrary to the former case, as there the law is repugnant to the husband's declaration.

A man ac-
knowledging
that he had
never con-
summated
with his di-
vorced wife
has no power
of *Rijaât*, al-
though he
have been in
retirement
with her.

poses the husband to have repudiated his wife by a sentence of divorce *undefined*, that is, without specifying whether it is *reversible* or *irreversible*; for if he were to declare it under the *latter* description, it holds so at all events.

IF a man divorce his wife after a retirement, and again take her back, and afterwards assert that he has not had carnal connexion with her, and she should be delivered of a child within a day short of two years after divorce, the *Rijaât* is valid notwithstanding his assertion, because the parentage of the child is established in him, as the woman had not declared the completion of her *Edit*, and a child may be supposed to continue so long in the womb, whence the husband is considered as having had carnal connexion with her before divorce, because if her pregnancy were ascribed to such connexion *after* divorce, the marriage stands dissolved on the instant of divorce, on account of its not having been then consummated; and of course the subsequent carnal connexion is unlawful; and *Mussulmans* are not supposed to commit any unlawful acts.

Rijaât may
be established
by the birth
of a child.

IF a man suspend the divorce of his wife upon the circumstance of her producing a child, and she be delivered of a child, and again of another within not less than six months after, although it were *more* than two years, *Rijaât* is established *, provided the woman have not declared the completion of her *Edit*, because divorce taking place upon the woman in consequence of her first delivery, *Edit* was incumbent upon her; and her second child must be supposed to proceed from an embrace of the husband during the *Edit*, which act on his part amounts to a formal reversal of the divorce.

IF a man say to his wife “every time that you produce a child “you are under divorce,” and she be delivered of three children at three separate births, that is, within not less than six months of each other, *Rijaât* is established by the birth of the *second* child, and in the same manner by that of the *third*, because, upon the birth of the *first*, divorce takes place, and *Edit* is incumbent, and upon that of the

* That is to say, the man is considered as having taken back his wife. (See the beginning of this chapter.)

second *Rijaât* is established, for the reason before observed, that it must be supposed to proceed from an embrace of the husband during the *Edit*; and a second divorce takes place, because the husband has suspended divorce upon childbirth with the expression “*every time that,*” and *Edit* is incumbent in consequence of this divorce; and by the birth of the third, *Rijaât* is again established, for the same reason as above, and a third divorce takes place in the same manner as the second: and in this case the *Edit* is to be counted by the courses, because the woman is not pregnant, but subject to courses, at the period of each divorce taking place upon her.

It is allowed to a woman under reversible divorce to adorn herself, as she is lawful to her husband on account of their marriage still holding; and as *Rijaât* is laudable, and her adorning of her person may excite him to it, the action is therefore permitted by the law.

A woman under reversible divorce may adorn herself.

It is not proper for a man, having a wife under reversible divorce, to approach her without previous intimation, or letting her hear his footsteps:—this is where he has no intention of *Rijaât*; because a woman is sometimes undressed, and it might happen that if he were to come upon her unawares he would see parts of her, the sight of which occasions *Rijaât*; and this not being his intention, he would give her another divorce, which would protract her *Edit*.

A man must not approach a reversibly divorced wife without giving her intimation.

A MAN cannot carry with him, upon a journey, a wife whom he has repudiated by a reversible divorce, until he have called witnesses to bear evidence to his *Rijaât*.—*Ziffer* says that the husband has such a power, because their marriage still holds; which is the reason why he may lawfully have carnal connexion with her, according to *Haneefa*.—The arguments of our doctors are twofold;—FIRST, the word of God, who has said “TAKE THEM NOT FORTH FROM THEIR DWELLINGS,”

A divorced wife cannot be carried upon a journey, until *Rijaât* be established.

where the text applies to the women under reversible divorce, the rying of whom upon a journey is the removal of them from their dwellings, and is therefore illegal;—SECONDLY, the only reason why the effect of a sentence of reversible divorce is postponed to the accomplishment of the *Edit* is, the possible intention or wish of the husband to take back his wife; but where he does not do so before the *Edit* is accomplished, it appears that he had no such wish or intention, in which case it would be evident that the sentence took effect upon the instant of his pronouncing it, and that the wife was consequently separated from that period; for if the effect of the sentence were in reality restricted to the completion of the *Edit*, another *Edit* would then always be requisite after the first; and hence, as it appears that the wife is, in effect, as a *stranger* to her husband, from the time of the sentence of divorce, it follows that he has no authority to carry her forth; whence it is here said that he cannot carry her upon a journey until he has called witnesses to bear evidence to his *Rijaât*;—in which case the *Edit* is annulled, and his authority re-established.

Cohabitation
is not made
illegal by a
reversible di-
vorce.

CARNAL connexion with a wife is not rendered illegal by a reversible divorce, according to our doctors. *Shafeï* maintains that it is rendered illegal thereby, since the connubial connexion is dissolved, because of the appearance of that which terminates marriage, namely, his sentence of divorce.—The argument of our doctors is that the connubial tie still continues, inasmuch that the husband is at liberty to take back his wife, even against her will, because a right of *Rijaât* is reserved to him out of tenderness, in order that he may be enabled to recover his wife when he becomes ashamed of having divorced her; and this necessarily implying that he is empowered to recover her, his being so proves that *Rijaât* is a continuance of the marriage, and not a marriage *de novo*, as a man cannot marry a woman against her will. With respect to what *Shafeï* advances, that “the connubial connexion
“ is

“ is dissolved on account of the appearance of that which terminates “ marriage, namely, his sentence of divorce,” it may be replied that the effect of the terminator is postponed to the completion of the *Edit*, according to all the doctors, out of tenderness to the husband, as above.

SECTION.

Of CIRCUMSTANCES which render a divorced WIFE lawful to her HUSBAND.

IN a case of irreverfible divorce, fhort of *three* divorces, the husband is at liberty to marry his wife again, either during her *Edit*, or after its completion, as the legality of the fubject ftill continues, fince the utter extinction of fuch legality depends upon a *third* divorce; and accordingly, until a third divorce take place, the legality of the fubject continues.

A man may marry a wife repudiated from him by one or two irreverfible divorces;

OBJECTION.—If the legality of the fubject continue, it follows that it is lawful for any other perfon befides the husband to marry the wife during her *Edit*.

REPLY.—Her marriage with any other during her *Edit* is forbidden, on account of its inducing a doubtful parentage; but if the husband marry her, this objection cannot exift.

IF a man pronounce *three* divorces upon a wife who is *free*, or *two* upon one who is a *slave*, fhe is not lawful to him until fhe fhall firft have been regularly efpoufed by another man; who, having duly confummed, afterwards divorces her, or dies, and her *Edit* from him be accomplished,

but if by *three* divorces he cannot marry her, until fhe be previously married to another man.

accomplished, because GOD has said “ IF HE DIVORCE HER, SHE IS “ NOT, AFTER THAT, LAWFUL TO HIM” (that is after a *third* divorce) “ UNTIL SHE MARRY ANOTHER HUSBAND.” And here *two* divorces to a *slave* are the same as *three* to a *free* woman, because the legality of the subject has only half its force in a slave, on account of her state of bondage; and hence it would follow that, to such an one, a divorce and an half stands the same as three divorces to a free woman, but as divorce is incapable of subdivision, *two* divorces are allowed.—As to what is said, that the second husband duly consummating is a condition, it is founded on the text here quoted, in which the word *Nikkah* [marriage] implies carnal connexion, as it bears two meanings, by one of which it signifies carnal conjunction, and by the other the legal union of the sexes, and it is on this occasion taken in the former sense: but even admitting that the word *Nikkah*, in the text, meant simply the marriage contract, yet the condition is established upon a well known tradition of the prophet, who being questioned concerning a person’s power of marrying again a wife who, after he had repudiated her by three divorces, had been married to another man, and whom, after retiring with her, and lifting her veil, that man had divorced, replied “ *the woman is not lawful to her first husband until she “ has tasted the embrace of the other;*” but the condition requires only the entrance of the *penis* into the *vagina*, and not the emission of seed, as the above tradition implies the entrance *generally*, whence that only is understood.

Nature of the consummation in the second marriage which renders a divorced wife again lawful to her first husband.

A YOUTH under puberty is the same as a full grown man with respect to legalizing;—that is to say, if a man give his wife three divorces, and she, after her *Edit*, marry with a youth under maturity, and he perform the carnal act with her, she then [in case of his *decease* or *divorce*] becomes lawful to her first husband, because the condition, namely, *entrance, in virtue of a regular marriage*, is necessarily supposed to be fulfilled.—*Málik* says that the carnal act of a *full grown man* is the condition, because unless he be arrived at maturity the wo-

man’s

man's *tasting* (that is, *enjoying pleasure* from) his embrace, which is the condition, is not fulfilled: but the cases before recited in the book of marriage disprove this distinction of *Málik*.—It is to be observed that it is recorded in the *Juma Sagheer*, that a boy under puberty, but who is such as to be able to perform the carnal embrace, is termed a *Moorábick*; and where such an one has carnal knowledge of his wife, ablution is incumbent upon her, and she is thereby rendered lawful to a former husband, if he should have repudiated her by three divorces; and the carnal embrace of such an one is implied from the circumstance of his having a priapism and desire. It is also to be observed that ablution is made incumbent upon the woman, in the present case, only on account of the entrance of the boy's *penis* into her *vagina* exciting an *emissio seminis* on her part, the necessity thereof with respect to her being solely in consequence of her full puberty; but it is not incumbent upon the *boy*, he not being subject to the necessity of such observance; but yet it is required of him, that he may be habituated to a laudable custom.

A FEMALE slave, whom her husband has repudiated by two divorces, is not rendered lawful to him by the carnal embrace of her master, because that which is essential to her legality, (namely *marriage*,) does not exist here.

If a man marry a woman whose husband had repudiated her by three divorces, under a condition of rendering her lawful to her former husband, as if he were to declare to her—"I marry you under a condition of rendering you lawful to your former husband,"—or, as if she were to say to him—"I marry with you under the condition of my becoming lawful to my former husband,"—this is an abominable marriage, because the second husband is here termed a *Mobullil*, or legalizer, and the prophet has said "let the curse of God fall upon the *Mobullil* and the *Moballal-le-hoo**: but nevertheless, if the par-

The second marriage, when contracted under a legalizing condition, is disapproved; but yet the woman is rendered legal by it to her first husband.

* *The thing rendered legal.* It means, on this occasion, a thing rendered legal by some indirect and unapproved expedient.

ties contract a marriage under this condition, and the man divorce the woman *after carnal connexion*, she, upon the completion of her *Edit*, becomes lawful to her former husband, as there undoubtedly exists a consummation in a regular marriage, which is the cause of legality, and the marriage is not invalidated by the condition.—It is recorded from *Aboo Yoosaf* that such a marriage is null, as it falls under the description of a *Nikkah Mowokket*, or *temporary* marriage, because the words of the husband, “ I marry you under a condition of rendering “ you lawful to your former husband,” imply “ I marry you until “ the time of our having carnal connexion, and not for an indefinite “ time,”—and is therefore the same as where a man says to a woman “ I marry you for a month,” and so forth; and the marriage being *invalid*, the woman cannot by that means be rendered lawful to her former husband: but in reply to this our doctors urge that the restriction of the marriage to any specified time is not expressly mentioned by the parties, nor does the man here marry the woman under any other condition than that of doing by her as marriage requires; and hence it does not come under the description of a *temporary* marriage.—It is recorded from *Mohammed* that the marriage is legal and valid, for the reasons before mentioned; but yet the woman is not thereby made lawful to her first husband, because the second husband here endeavours to *precipitate* a thing which the law *postpones*, (for the law postpones her legality to her former husband to the death of her present,) and therefore meets a due return in the defeat of his design, (to wit, legalizing the woman to her former husband;) in the same manner as in the murder of an inheritee; that is to say, if any person slay his inheritee, he is thereby cut off from inheritance, as having attempted to precipitate that which the law has postponed, and thus meets his punishment in the defeat of his design, (to wit, immediate inheritance;) and so also in the present case.

The first husband, recovering his

If a man repudiate his wife by *one* or by *two* divorces, and, her *Edit* being completed, she be married to another man, and afterwards return

return to her former husband, he becomes again authorized so far as *three* divorces, the *one* or the *two* divorces formerly pronounced upon her by him having been cancelled and obliterated by her marriage with the second husband, in the same manner as *three* divorces would have been *. This is the doctrine of the two *Elders*.—*Mohammed* says that marriage with a second husband does not obliterate any thing short of *three* divorces. The proofs on either side are drawn from the *Arabic*.

wife, by an intervenient marriage, recovers his full power of divorce over her.

If a man pronounce three divorces upon his wife, and she afterwards declare that “her *Edit* having been duly accomplished, she has “been married to another man, and enjoyed and divorced by him, “and that her *Edit* from him is elapsed,”—her former husband may lawfully admit her asseveration, and marry her, provided that from the period of his divorcing her such a space of time have elapsed as affords a possibility of this having been the case, and that he actually believe her assertion to be true; because the substance of the woman’s assertion is either a matter of mere *temporal* concern, (as not comprehending any merit or demerit before God,) or it is a matter of *religion*, (on account of *legality* being suspended upon it,) and the declaration of a single person, either in matters of a temporal or spiritual nature, is worthy of credit; and the confirmation of her assertion is not forbidden or reprobated, where the space of time which has intervened admits the possibility of its truth.—The learned differ concerning the shortest period which admits of this possibility, as shall be fully explained in treating of *Edit*.

The wife’s declaration of her having been legalized is to be credited.

* That is to say, one or two divorces are obliterated, the same as three would be, had that been the number formerly pronounced by him.—It is necessary to observe that this case involves a principle in divorce which is no where expressly mentioned; namely, that the same woman is not a legal subject of more than three divorces to any one man, and consequently, that a man who repudiates his wife by *two* divorces, (for instance,) if he marry her again, unless the intervention of another husband obliterate these two, has no power beyond *one* divorce in the second marriage.

C H A P. VII.

Of *Aila*.

Definition of
the term.

AILA, in its primitive sense, signifies *a vow*.—In law, it implies a husband swearing to abstain from carnal knowledge of his wife for any time above *four* months, if she be a free woman, or *two* months, if she be a slave.

The mode in
which *Aila* is
established.

If a man swear that he will not have carnal connexion with his wife,—or, that he will not have such connexion with her within four months,—an *Aila* is established; because God has said “ WHERE A
“ MAN MAKES A VOW [*Aila*] WITH RESPECT TO HIS WIFE, HE
“ MUST STAY FOUR MONTHS,”—to the end of the verse.

In breach of
Aila expia-
tion is in-
cumbent:

but if it be
observed, a
divorce irre-
versible en-
sues at its
termination.

If a man, in a case of *Aila*, have carnal knowledge of his wife within four months after, he is forsworn in his vow, and expiation is incumbent upon him, this being incurred by the breach of his vow; and the *Aila* drops, as his vow is cancelled by the breach of it: but if he have not carnal knowledge of her for the space of four months, a divorce irreversible takes place, independant of any decree of separation from the magistrate.—*Shafëi* says that a decree of the magistrate is requisite, because the husband here withholds her right (namely *carnal connexion*) from his wife, and hence the magistrate acts as his substitute, in effecting a separation; as in the case of eunuchs and impotent persons: in short, according to *Shafëi*, a right to demand separation rests

rests with the woman, in the same manner as in the case of her marriage to one who is impotent or an eunuch; and in consequence of a decree of the magistrate she becomes repudiated by a divorce irrevocable.—The arguments of our doctors are twofold:—FIRST, the husband, in abstaining from carnal connexion for the space of four months, acts unjustly towards his wife, by withholding from her that which is her right, for which the law makes him a due return, in depriving him of the benefit of marriage upon the expiration of that term; and this is an opinion recorded from *Othman*, and *Alee*, and *Abdoola-Ibn-Mussaood*, and *Abdoola-Ibn-Abbaas*, and *Abdoola-Ibn-Aumroo*, and *Zeyd-Ibn-Sabit*:—SECONDLY, in times of ignorance * an *Aila* stood as a *divorce*, and the law afterwards constituted it a divorce *postponed to the period of four months*:—now, if a man swear to abstain for *four months*, his vow drops at the expiration of that term; that is, if the same man should afterwards marry and cohabit with the same woman, he is not forsworn, because the vow was temporary; but if he should have sworn to abstain *forever*, his vow continues in force, because it is general, (that is to say, is not restricted to four months,) and no violation appears by which it might be cancelled: yet divorce does not take place upon it repeatedly, unless where marriage is repeated, because, after separation, the withholding of the woman's right cannot be supposed to exist; but if, after separation, the vower were to marry her again, the *Aila* returns; and consequently, upon carnal cohabitation in this marriage, he would be forsworn; or, if he abstain, an irrevocable divorce again takes place upon her, at the expiration of four months, as before, because the obligation of the vow continues, on account of its being *general*, and in consequence of the man marrying her again her right to carnal connexion is established, and of course his injustice in withholding it from her.—And here it is to be observed that the recommencement of the *Aila* is to be counted from the date of the second marriage; and if this man were again, a *third* time, to marry

* That is, before the establishment of the *Mussulman* faith.

her, the *Aila* returns, and occasions an irreverfible divorce at the expiration of four months, in cafe of the husband refraining from carnal connexion for that term, for the reasons already ftated.—What is now advanced proceeds upon a fuppoftion of the vower marrying the woman again without the intervention of her marriage with another man; but if, in the interim, fhe had been married to another man, divorce would not take place in confequence of the vower abftaining from carnal connexion for the fpace of four months, in the fecond marriage, becaufe the vow is confined, in its effect, to divorce in the firft or original propriety *, the *Aila*, in the prefent cafe, being the fame as if the husband were to fufpend divorce upon his abftaining from carnal cohabitation for the fpace of four months, where the effect is refticted to the propriety then exifting, and fo in this cafe likewife.—This cafe is grafted on the cafe of obliteration, concerning which there is a difference of opinion between *Ziffer* and our doctors; and that cafe is where a man, having faid to his wife “ if you enter “ this houfe you are under three divorces,” afterwards repudiates her by an exprefs fentence of three divorces, and fhe is again married to him, and then enters the faid houfe, from which no divorce takes place, according to our doctors, whereas *Ziffer* holds that divorce takes place; as was recited at large in a former chapter.—But ob-

* When a man marries a woman, his *Milk* (which is here and elfewhere rendered *propriety*, or *right*; that is, *peculiarity of poffeffion*;) continues with refpect to her, notwithstanding divorce, until it be abrogated by her marriage with another. In fhort, the propriety, or peculiar right, of a husband is a principle which is alive in the actual exiftence of marriage, and is not *annihilated*, but remains *dormant*, or *quiefcent*, under a termination of it by divorce; and hence it is that, where a man marries a woman, after having repudiated her, he is faid to attain a *revival* of propriety, not a propriety *de novo*. Many of the moft important and (apparently) unaccountable laws of divorce are to be traced to this fource. In the prefent cafe the *Aila* is faid to have been refticted in its effect to the vower's original propriety, and confequently, in its effect, recurs upon every revival of that propriety by marriage; but it being abrogated by the woman's intervening marriage with another, the vower's fubfequent marriage with her is an attainment of propriety *de novo*, in which the vow cannot operate.

serve that, in the case now under consideration, although divorce do not take place, yet the obligation of the vow remains, as it was general, and continues uncanceled by any breach of it;—and hence, if the man should ever have carnal connexion with the wife at any subsequent period, expiation is incumbent upon him, on account of this breach of his vow.

IF a man make a vow to abstain from carnal knowledge of his wife for *less* than four months, (as if he were to restrict it to *two* or to *three* months,) it is not an *Aila*, because *Ibn Abbas* has said that *Aila* is not occasioned by a vow of abstinence from carnal connexion with a wife for a period short of four months; and also, because a husband who abstains from the embrace of his wife for the space of four months or upwards, has no obstruction to plead, that being the longest space during which any obstruction is supposed to exist*; but an obstruction may continue for a time *short* of four months; and consequently divorce will not take place from a vow of abstinence for that time.

A vow of abstinence for a term short of four months does not constitute *Aila*.

IF a man make a vow, saying to his wife “by GOD I will not have carnal connexion with you for two months, nor for two months after that,” *Aila* is established: the proofs of this are drawn from the *Arabic*.—But if a man swear that “he will not have carnal connexion with his wife for two months,” and then remain silent for a day, and the next day again swear that “he will not have carnal connexion with her for two months after the other two,” *Alia* is not established, because the second vow is distinct and separate from the former, the husband, upon his making his first vow, being prohibited from carnal connexion for *two* months, and upon making the

* By the *obstruction* here mentioned is to be understood pregnancy for the last four months, during which it is not deemed lawful for a husband to have carnal connexion with his wife.

second, for *four* months, excepting the day on which he remained silent, whence the term of *four months complete* (being the space of time requisite to constitute *Aila*) is not included in this vow.

If a man vow that “ he will not have carnal connexion with his wife for a year excepting a day,” *Aila* is not established.—This is contrary to the opinion of *Ziffer*, who places the *excepted* day at the *end* of the year, conceiving this to be analogous to a case of hire;—that is to say, if a man agree to let or hire an house to another for a year excepting a day, the day excepted is transferred to the *end* of the year, and so in this case likewise; and the exception being transferred to the *end* of the four months, the complete term of an *Aila* is involved in the vow.—The argument of our doctors is that the term *Mawálee* [maker of an *Aila*] is applied only to one who cannot have carnal connexion with his wife for the space of four months, without incurring a penalty, such as *expiation*, for instance; but in the present case the husband may have carnal connexion with his wife without incurring any penalty, because the *day* excepted is not particularly specified:—contrary to a case of *hire*, where the excepted day is transferred to the end of the year, from necessity, as the contract, or engagement of hire, would without that be void, on account of ignorance; whereas this is not the case in a *vow*.—But if, after this vow, the man were on any particular day to have carnal connexion with his wife, and four months or upwards of the year still remain, *Aila* is established, as the exception then drops.

If a man, being in *Bafra*, and his wife in *Koofa*, swear that he will not go to *Koofa*, *Aila* is not established, because he can still have carnal connexion with his wife, without incurring any penalty*, by

* That is, without subjecting himself to any obligation of performing expiation for the breach of his vow.

bringing her from *Koofa* to the place of his residence, and there enjoying her.

IF a man make a vow, annexing to his breach of it *pilgrimage, fast, alms-gift, manumission, or divorce*, by saying to his wife “if I have carnal connexion with you, I am under an obligation to *fast*,”—or “to give alms,”—or “to perform a pilgrimage,”—or “such an one my slave is free,”—or “you are divorced,”—or “such an one, my wife, is divorced,”—*Aila* is established, as in this case an obstacle is opposed to the commission of the carnal act from the terms of the vow, in the mention of the condition and the penalty, the several penalties abovementioned amounting to prohibition, as the incurring of any of them is attended with trouble or injury.—*Abou Yoozaf* objects that suspending the manumission of a slave upon the commission of the carnal act does not amount to an *Aila*, as it is possible for the husband to evade the penalty, by first selling the slave, in which case he might commit the act without incurring any penalty.—To this *Haneefa* and *Mohammed* reply that the sale of the slave is not a matter of certainty, as a purchaser is not always found, and hence this objection is of no weight.

A vow of abstinence, under a penalty annexed, constitutes an *Aila*.

IF a man make an *Aila* with respect to a wife under *reversible* divorce, the *Aila* is established; but if, with respect to one under *irreversible* divorce, it is *not* established; because the connubial union still subsists in the former case, but not in the latter; and in the sacred writings she alone is declared to be a subject of a vow of abstinence who is the wife of the vower.

Aila holds respecting a wife under *reversible* divorce;

IF a man make an *Aila* with respect to a wife under *reversible* divorce, and her *Edit* be accomplished before the expiration of the term of *Aila*, the *Aila* then drops, as the woman (becoming totally separated by the completion of her *Edit*) no longer remains a subject of it.

but drops on the accomplishment of her *Edit*.

IF

An *Aila* made respecting a woman *before* marriage is nugatory.

IF a man say to a strange woman “by God I will never have carnal connexion with you,”—or “you are to me like the back of my mother*,” and he afterwards marry her, neither *Aila* nor *Zibâr* are established, as these expressions are *ipso facto* null, the woman, at the time of his addressing her in these terms, not being a subject of either one or the other, since none are so but wives: but yet if a man marry a woman after having vowed in this manner, and have carnal knowledge of her, he must perform expiation on account of breach of his vow, which is still binding upon him.

THE term of *Aila*, with respect to a slave, is *two months*, this being the space of time fixed for her final separation; thus the term of *Aila* of a slave is half that of a free woman, as well as her *Edit*.

An *Aila* made respecting a wife at a distance may be orally rescinded.

IF, at the time of making an *Aila* vow, there should exist any natural or accidental impediment to generation on the part of either the man or the woman, (such as the former being sick, or the latter being *impervia coeunti*, or an infant, incapable of the carnal act,—or their being at such a distance from each other as does not admit of their meeting during its term,) it is, in this case, in the man's power to rescind his *Aila*, by saying “I have returned to that woman,” upon which the *Aila* drops.—*Shaf'î* says that *Aila* cannot be rescinded but by the carnal act, (and such is likewise the opinion of *Tebâvee*,) because, if the above declaration of the husband amounted to a rescindment, it would follow that a breach of the vow is therein established, and consequently that expiation is incumbent; whereas this is not the case.—The argument of our doctors is that, the *Mawâlee*, having wronged his wife by a vow prohibiting his carnal connexion with her, it remains with him to make her such satisfaction as circumstances admit of, by a verbal acknowledgment; and

* A species of abuse, by which, in times of ignorance, the wife stood virtually divorced. Since the propagation of the faith, it only occasions the wife to be prohibited to her husband until such time as he shall perform an expiation. See article *Zibâr*.

the wrong being thereby removed, he is no longer subject to the penalty annexed to it, namely, divorce.—It is to be observed that if the obstruction to generation, in the case under consideration, be removed during *Aila*, and after the *Mawálee's* oral rescindment as above, such rescindment is null, and his commission of the carnal act is then requisite to rescind it, as he is here enabled to employ the actual means, whilst the end remains as yet unattained.

If a man say to his wife “you are prohibited to me,” let him be asked concerning the intention of these words; and if he say “my design, in those words, was to express a falsehood,” his declaration is to be credited, as his intention coincides with their actual tenor. (Some have said that his declaration is not to be credited before the *Kázee**, as his speech is apparently a *vow*, since the rendering prohibited that which is lawful amounts to a vow.) And if he say “I intended *divorce*,” a single divorce irreversible takes place, except where he designed three divorces, in which case three divorces take place, as was stated in treating of *Talák Kináyat*, or divorce by implication: and if he say “I intended *Zibár*,” *Zibár* is accordingly established with the two *Elders*. *Mohammed* says that this is not *Zibár*, because it is essential to *Zibár* that the husband compare his wife to his own relation within the prohibited degrees, which is not the case in this instance.—The argument of the two *Elders* is that he has declared prohibition *generally*; and *Zibár* also involves a sort of prohibition, (namely, the prohibition of carnal connexion, until after expiation,) and a circumstance generally expressed is capable of bearing a restricted construction.—And if he say “I intended prohibition,”—or “I had no particular intention,” his speech amounts to a vow, and consequently an *Aila* is established from it, because a vow is the original thing (with our doctors) in rendering prohibited that which is lawful, as shall be demonstrated in treating of *Vows*. Some doctors construe any expression of prohibition into a divorce, where there is no particular intention, as being agreeable to custom.

An equivocal expression of divorce, takes effect according to the husband's interpretation of his intention.

* That is, in point of law.

C H A P. VIII.

Of *Khoola*.

Definition of
the term.

KHoola, in its primitive sense, means to *draw off* or *dig up*. In law it signifies an agreement entered into for the purpose of dissolving a connubial connexion, in lieu of a compensation paid by the wife to her husband out of her property.—This is the definition of it in the *Jama Ramooz*.

Reasons
which justify
Khoola, or di-
vorce for a
compensa-
tion;

which occa-
sions a single
irreversible
divorce.

WHENEVER enmity takes place between husband and wife, and they both see reason to apprehend that the ends of marriage are not likely to be answered by a continuance of their union, the woman need not scruple to release herself from the power of her husband, by offering such a compensation as may induce him to liberate her, because the word of GOD says “NO CRIME IS IMPUTED TO THE WIFE “OR HER HUSBAND RESPECTING THE MATTER IN LIEU OF WHICH “SHE HATH RELEASED HERSELF;” that is to say, there is no crime in the husband’s accepting such compensation, nor in the wife’s giving it: and where the compensation is thus offered and accepted, a single divorce irreversible takes place, in virtue of *Khoola*; and the woman is answerable for the amount of it, because the prophet has said that *Khoola* effects an irreversible divorce; and also, because the word *Khoola* bears the sense of divorce, whence it is that it is classed with the implied expressions of it, and from an implied divorce a divorce irreversible

irreversible takes place;—but intention is not essential to *Khoola*, because by the mention of a compensation, the act is made independent of it;—and also, because it is not to be imagined that the woman would relinquish any part of her property but with a view to her own safety and ease, which is not to be obtained but by a total separation. What is now advanced proceeds upon a supposition of the aversion being on the part of the *wife*, and not on that of the *husband*; but if it be on the part of the *husband*, it would be abominable in him to take any thing from her, because the sacred text says “ IF YE BE
 “ DESIROUS OF CHANGING (that is, repudiating one wife, and marry-
 “ ing another,) TAKE NOT FROM HER ANY THING;”—and also, because a man, by divorcing his wife from such a desire of change, involves her in distress; and it behoves him not to increase that distress by taking her property. If, moreover, the aversion be on the part of the woman, it is abominable in the husband to take from her more than what he had given or settled upon her, namely, her *dower*. (According to the *Jama Sagheer*, if the husband take from her more than the dower, it is strictly legal, as the text of the *Koran* already quoted is expressed generally: but the former opinion is founded on a tradition of the prophet, to whom a woman having mentioned her hatred of her husband, he advised her to give up her *dower*, as a compensation, to induce the husband to divorce her, to which she replied “ I will give that and more!” but the prophet answered “ not more!”—and here the aversion was on the part of the *woman*.)—But yet if the husband should take *more* than the dower, it is approved in point of law;—and so also, if he were to take any compensation, where the aversion is on his part, because the sacred text goes to establish two points; one, the lawfulness of *Khoola* in a *judicial* view; and the other, its admissibility between the parties and God Almighty; now, from the tradition which has been recited, it appears that where the aversion is on the part of the wife, a *Khoola* for more than the dower is disapproved; and, on the other hand, the text before quoted shews that if the aversion be on the part of the husband, he should not take any thing

thing, and consequently not more than the dower *a fortiori*; wherefore the ground of *admissibility* is abandoned, on account of the contradiction between the tradition and the text; and practice is established upon the other remaining ground, namely, the lawfulness of *Khoola* in a *judicial* view.

The wife is responsible for the compensation.

If a husband offer to divorce his wife for a compensation, and she consent, divorce takes place, and she becomes answerable for the compensation; because the husband is empowered, of himself, to pronounce either an *immediate* or a *suspended* divorce, and he here suspends the divorce upon the assent of the woman, who is at liberty to agree to the compensation, as she has authority over her own person, and the matrimonial authority, like retaliation, is one of those things for which a compensation is lawful, although it do not consist of property; and the divorce is irreversible for the reasons already assigned, and also because *Khoola* is understood to be an exchange of property for the person; and upon the husband being vested with a right in the property, the woman, in return, is vested with a right in her own person, in order that an equality may be established.

Difference between a wife requiring *Khoola* in lieu of an unlawful article, and requiring *divorce* in lieu of the same in express terms.

If the thing offered to the husband in return for *Khoola* be not lawful property, (as if the woman were to desire him to grant her *Khoola* in lieu of *wine* or a *hog*, and he consent, saying "I agree to a *Khoola* "in lieu of such wine," or so forth,) a divorce *irreversible* takes place, but nothing is due to the husband: but if a compensation for *divorce* consist of a thing not lawful property, (as if the woman were to desire her husband to *divorce* her for a cask of wine, and he consent, saying "I *divorce* you in consideration of such wine," and so forth,) a *reversible* divorce takes place.—The reason for divorce taking place in both instances is that the husband has suspended it upon the consent of the woman, which is already testified; and the difference between the case of *Khoola* and that of *divorce* is that, in the *former*, the compensation being null, the word used by the husband [*Khoola*] remains, and

and that, as being a *Kināyat*, or *implied* sentence, is effective of *irreversible* divorce; whereas, in the latter, the word divorce is *express*, and consequently occasions *reversible* divorce only.—And the husband has here no claim upon his wife, because she has not named any appreciable article, which might be the means of deceiving him; and also, because if the thing named be particularly specified by her, it cannot be lawfully made incumbent upon her in favour of her husband, on account of his being a *Mussulman*; and in the same manner, it cannot be made incumbent if it be not particularly specified, as in that case she does not charge herself with it:—but it is otherwise where she specifies a thing under a false denomination, (as if, for instance, she were to make a proposal of *Khoola* to her husband, by saying “divorce me for this cask of vinegar,” and he agree, and the cask afterwards appear to contain wine,) for in this case he has a claim upon her for an equal quantity of vinegar of the medium standard, because her naming an appreciable article has been the means of deceiving him:—and it is also contrary to a case in which a master emancipates his slave, or constitutes him a *Mokâtib*, in return for a cask of wine; for then the emancipated person is responsible to his emancipator for the amount of his estimated value as a slave, because the owner’s property in his slave is a thing which bears a certain estimable value, and which he therefore cannot be supposed willing to relinquish gratuitously; whereas the property in the wife’s person is not of any estimable value in the circumstance of the *dissolution* of the connubial right, as the only reason for its being so, in the *attainment* of such right, is its importance, and consequent title to respect; whence it is that the attainment of that right without a return is not countenanced by the law; but the relinquishment of that right being *in itself* a manifestation of such respect, there is then no occasion to impose upon any one an obligation of property for the purpose of manifesting it.

WHATEVER

The compensation for *Khoola* may consist of any thing which is lawful in dower.

WHATEVER is capable of being accepted as a dower, is also capable of being accepted as a compensation for *Khoola*, since whatever is capable of being a proper return for that which is appreciable, (namely, the woman's person at the time of its coming into *propriety*,) must, in a superior degree, be capable of being a compensation for a thing *not* appreciable, (namely, the woman's person at the time of the destruction of *propriety*.)

Case of *Khoola* required in lieu of property unspecified.

IF a woman say to her husband "Grant me *Khoola* for what is in my hand," and he agree, and it should afterwards appear that she had *nothing* in her hand, divorce takes place; but nothing remains incumbent upon the woman, as she has not deceived her husband by any specific mention of property: but if she were to say "grant me *Khoola* for the *property* in my hand," and he agree accordingly, and it should appear that she had nothing in her hand, she must in this case return to him her dower, because she has deceived him by a specification of property which did not exist; and hence he does not appear to consent to a relinquishment of the connubial propriety without a return, and the woman cannot be legally bound to give the thing specified, or its value, as its kind or species is unknown; neither can she be laid under any legal obligation to render the estimated value of her *person*, (that is, her *proper dower*,) because, in the circumstance of the destruction of the connubial propriety, *that* is not appreciable; it is therefore fixed that there remain incumbent upon her whatever the husband may have given in lieu of his attainment of the propriety, in order that thus he may be shielded from injury.—If, moreover, a woman say to her husband "grant me *Khoola* for the *Dirms* in my hand," and he agree, and it afterwards appear that she had nothing in her hand, he has a claim upon her for *three Dirms*—The proofs are here taken from the *Arabic*.

Case of *Khoola* in lieu of an absconded slave.

IF a man enter into an agreement of *Khoola* with his wife, in lieu of an absconded slave, on the condition that, if the slave be recovered, she

she shall make him over to the husband, but if not, she shall not be answerable; yet she is not released from responsibility, and it remains incumbent upon her either to make delivery of the slave or of his value, because an agreement of *Khoola* is of a reciprocal nature, (whence it is requisite that the recompence be received on the part of the husband;) and the condition of release from responsibility agreed to by the parties is disapproved, and consequently void; but yet the *Khoola* is not so, as it is not rendered void by involving an invalid condition. Analogous to this is a case of marriage;—for if a man marry a woman, agreeing to give, as her dower, an absconded slave, on the condition that if he be recovered he shall be made over to her—but if not, that the husband is not to be answerable; yet the husband is not released from responsibility, and it remains incumbent upon him either to deliver to his wife the slave specified, when able so to do, or to pay her his price.

IF a woman say to her husband “divorce me thrice for one thousand *Dirms*,” and he pronounce a single divorce, there remains incumbent upon her one third of the thousand *Dirms*, because, in requiring *three* divorces for the whole sum, she has required each divorce, separately, for the *third* of that sum.—It is however to be observed that the single divorce pronounced in this case is irreverfible, as being given in lieu of property.

Cases of
Khoola granted for a specified sum.

IF a woman say to her husband “divorce me thrice, *upon my paying you one thousand Dirms*,” and the husband give her one divorce, nothing is incumbent upon the woman, according to *Haneefa*, and the husband is at liberty to take her back. The two disciples say that a divorce irreverfible takes place in return for one third of the thousand *Dirms*, because the expression “*upon payment of*” is the same as the word “*for*” in contracts of exchange. The argument of *Haneefa* is that the expression “*upon payment*” is a condition, and the thing conditioned cannot be divided according to the parts of the condition itself:

itself: contrary to the word "*for*," as that is used to express a *return*, and as the property is not due, divorce *express* (and consequently *reversible*) remains.

If a man say to his wife "divorce yourself thrice, for (or *upon* " *payment of*) one thousand *Dirms*, and she pronounce upon herself one divorce, no effect whatever takes place, because the husband is not desirous that she should become *separated* for any thing short of the whole sum specified: contrary to a case where the proposal comes from the wife, (as in the preceding instance,) because, as she there appears to be desirous of procuring separation from her husband at the whole expence specified, it follows that she is willing to procure it, at the *third* of that expence only, *a fortiori*.

If a man say to his wife "you are divorced *upon payment of* one " thousand *Dirms*," and she agree, divorce takes place upon her, and the husband has a claim upon her for the thousand *Dirms*, in the same manner as where a man says "you are divorced *for* a thousand *Dirms*," and the wife consents, in which case divorce takes place, and one thousand *Dirms* are incumbent upon her:—but it is to be observed that in both cases the woman's assent is a condition, because the words of the husband "you are divorced *for* one thousand *Dirms*," mean "you " are under divorce *in return for* one thousand *Dirms* due from you " to me,"—and his words "you are divorced *upon payment of* one " thousand *Dirms*," mean "you are under divorce *on condition that* one thousand *Dirms* be due from you to me," and the return cannot be made incumbent upon her without her assent; moreover, a circumstance suspended upon a condition cannot take place until the condition be previously fulfilled, wherefore the effect in this case depends upon her agreeing to what is proposed. And here the divorce is irreversible, for the reason already stated.

If

IF a man say to his wife “you are divorced, and there is against you a thousand *Dirms*,” and she consent,—or, if a man say to his slave “you are free, and there is against you a thousand *Dirms*,” and the slave assent,—the slave is free, and divorce takes place upon the wife, but nothing remains incumbent upon either, according to *Haneefa*:—the rule is also the same if they were not to assent.—The two disciples say that the sum specified is incumbent upon them, where they assent; but that, if they do not assent, neither divorce nor emancipation take place; for they argue that the latter part of the husband’s address is such as is used in bargains of exchange; and a contract of *Khoola*, or of *Kitabat*, being a contract of exchange, is therefore to be considered as such;—as in hire, for instance, where if a man say to another “carry this burthen, and there is a *Dirm* for you,” it is the same as if he were to say “carry this burthen for a *Dirm*.”—To this *Haneefa* replies that the latter part of the sentence has a separate and detached sense, and therefore is not to be connected with the preceding part, unless there be something to shew that it is so;—but here nothing exists to evince such connexion, because divorce and manumission are frequently produced without any substantial return:—contrary to cases of *sale*, or of *hire*, as neither of these are to be conceived without a substantial compensation.

IF a man say to his wife “you are divorced for a thousand *Dirms*, “on a condition of option to me (or, *to you*) for three days,” and she consent, the option is invalid, where it is reserved to *him*, but valid where it is reserved to *her*; and if she reject his proposal within the three days, the *Khoola* is null; but if she do not reject it within that time, the divorce takes place, and the sum specified by the husband becomes incumbent upon her.—This is the doctrine of *Haneefa*. The two disciples say that the option is null in either case, and that divorce takes place upon the woman, and the sum specified becomes incumbent upon her, because option is used for the purpose of dissolving a contract, or other agreement, after it has been concluded,

A proposal of *Khoola* made to the wife, with a reserve of option to the husband, is invalid.

and *not* for preventing the *execution* of it; and the act of the man, or of the woman, implying *propofal* on the part of the *former*, and *acceptance* on that of the *latter*, does not carry with it *dissolution* on either part; his propofal does not, as it is a *Yameen*, or fufpending vow, on account of its involving a condition and a confequence, (namely, the fufpention of divorce upon the woman's confent;) and a vow is in itfelf incapable of effecting diffolution; nor does her acceptance, as that is the condition of the vow, and as the vow is in itfelf incapable of effecting diffolution, fo is the condition; and fuch being the cafe, the referve of option on either part is null.—The argument of *Haneefa* is that *Khoola* on the part of the woman ftands as a *sale*, fince it is a transfer of property for a return, and accordingly, if it proceed firft from the wife, by her faying to her hufband “divorce me in return “for one thoufand *Dirms*, on a condition of option to me (or, *to you*) “for three days,” and fhe afterwards retract before her hufband fignifies his confent, her retraction is approved, on which account it is refticted to that *Majlis*, or fituation, and does not extend beyond it, —that is, if fhe rife from her feat before her hufband fignifies his affent, it becomes null; the condition of option in it therefore, when proceeding from the wife, is approved; but when it proceeds from the *hufband*, the condition of option is not approved, becaufe it is then a *vow*, wherefore his retraction of it is not approved, and it continues in force beyond the *Majlis*; and as it is a vow on the part of the hufband, he can have no option, fince a vow does not admit of option. Let it be alfo obferved that the cafe of a flave, with refpect to manumiffion, is the fame as that of a wife, with refpect to divorce; —that is to fay, manumiffion for a confideration is an exchange, on the part of a flave, the fame as divorce for a return, on the part of a wife.

The affertion of the hufband refpecting *Khoola* is to be credited.

If a man fay to his wife “I yefterday divorced you for a thoufand “*Dirms*, but you did not confent,”—and the woman reply that fhe *did* confent, the affertion of the hufband is to be credited: but if a man
fay

say to another “ I yesterday sold you this slave for a thousand *Dirms*, “ but you did not consent,” and the other reply that he *did* consent, the assertion of the purchaser is to be credited.—The reason of the difference between these two cases is that divorce for a compensation is a vow, when proceeding from the husband, and his acknowledgment of his having made the proposal does not necessarily imply an acknowledgment of the condition having taken place, as the vow holds good independant of that circumstance, whereas *sale* cannot be effected without the consent of the purchaser, and hence an acknowledgment of sale necessarily implies an acknowledgment of that circumstance without which sale cannot exist, namely, *consent*, and the seller’s denial of that circumstance is a contradiction to his previous acknowledgment, and consequently not to be credited.

A MOBÂRAT, or *mutual discharge*, (signified by a man saying to his wife “ I am discharged from the marriage between you and me,” and her consenting to it,) is the same as *Kboola*,—that is to say, in consequence of the declaration of both, every claim which each had upon the other drops, so far as those claims are connected with their marriage. This is the doctrine of *Haneefa*. *Mohammed* says that nothing is done away by either except what is *particularly mentioned* by both the husband and the wife. *Abou Yoosaf* unites with *Mohammed*, as to the *Kboola*, but with *Haneefa* as to the mutual discharge.—The argument of *Mohammed* is that *mutual discharge* and *Kboola* are contracts of exchange, in which the circumstances specifically stipulated are alone regarded, and not those which are *not* stipulated.—The argument of *Abou Yoosaf* is that the word *Mobârat*, from its grammatical form, bears a *reciprocal* sense, and therefore requires that the discharge be equally established on both sides; and this is general; yet the discharge is in this case restricted to those rights connected with marriage, as the design proves it to be so; but *Kboola* only requires that the woman be freed from the restraint of her husband; and as that

A mutual discharge leaves each party without any claim upon the other.

is obtained by the dissolution of the marriage, it does not require that all its effects be terminated. The argument of *Haneefa* is that *Khoola* bears the sense of *separation*, and that is general, the same as a *mutual discharge*, and consequently marriage is thereby terminated, together with all its rights and effects, the same as by a mutual discharge.

Khoola entered into by a father on behalf of his infant daughter is invalid,

IF a father transact a *Khoola* with the husband of his infant daughter, agreeing to pay the consideration out of her property, the *Khoola* is not valid with respect to her, because this exhibits no regard for her interest, as her person is not appreciable in the *dissolution* of a marriage, whereas the consideration is so: contrary to *marriage*, (as where a man contracts his infant daughter to another,) for that is valid, because the woman's person, on entering into a marriage, is appreciable:—and the woman's person not being appreciable in the dissolution of a marriage, the *Khoola* of a wife sick of a mortal illness is considered as proceeding from the third of her property; but being appreciable upon entrance into a marriage, if a man sick of a mortal illness were to marry a woman on a proper dower, it is considered as coming from the *whole* of his property.—The *Khoola*, therefore, being illegal, the dower of the infant does not drop, nor does the husband acquire any right to her property.—There are two traditions with respect to the act of the father occasioning divorce in this instance; according to one divorce does take place; but according to the other it does not; the former, however, is the better opinion, because the *Khoola* is a suspension of divorce upon the consent of the father, which is the same as upon any other condition.

unless he engage to hold himself responsible for the compensation,

IF a father transact a *Khoola* on the part of his infant daughter, for a certain sum, engaging to hold himself responsible for the payment, the *Khoola* is valid, and the sum specified becomes incumbent upon him, because the engagement even of a stranger for the consideration

deration of *Khoola* is valid, and consequently that of a father in a superior degree: in this instance also the infant's dower does not drop, as the father has no authority with respect to the relinquishment of it.—And if the father were to stipulate that his daughter is to be responsible for the sum specified, this will depend upon her consent where she is competent, (that is, capable of comprehending the nature of her situation, and that of the present transaction, and pronouncing upon them;) and if she consent, divorce takes place, on account of the condition being fulfilled upon which it is suspended: but the sum specified (or *consideration*) is not incumbent upon her, as an infant is incapable of undertaking the discharge of any pecuniary obligation; and if the father consent on his daughter's behalf, there are two traditions concerning it;—according to one, divorce does not take place until she shall eventually express her consent; and according to another, divorce takes place independent of it; but here the compensation agreed for is not incumbent upon her at all events.—And in the same manner, if a father, transacting a *Khoola* on the part of his infant daughter, agree that the compensation shall consist of her dower, and he happen not to be surety for the same*, the validity of the *Khoola* depends upon the daughter's consent, which if she declare, divorce takes place; but yet her dower does not drop: and here also, if the father consent on his daughter's behalf, there are two traditions concerning it, as already stated: if, however, he be surety for the dower, amounting to one thousand *Dirms* (for instance,) divorce takes place, because the condition (namely *consent*) is existing; and five hundred *Dirms* only are incumbent upon him, according to a favourable construction of the law. Analogy would suggest that he is liable for the whole thousand, upon this ground, that where an adult woman transacts *Khoola* on her own behalf, before consummation of the marriage, for any specified sum, (say one thousand *Dirms*,) and her dower be also one thousand, the whole sum is incumbent upon

or refer it to
his daughter's
consent.

* See Book of Marriage, Chap. III.

her.

her, and is discharged by five hundred dropping from her dower, and her paying the other five hundred out of her own property:—but according to the more favourable construction of the law, nothing whatever is incumbent upon her, because the intent of the husband, in the transaction, is merely to free himself from the obligation of her dower; and this end being obtained, nothing beyond that remains incumbent upon her.

C H A P. IX.

Of *Zihâr*.

Definition of
the term.

THE word *Zihâr* is derived from *Zibr*, the back.—In the language of the law it signifies a man comparing his wife to any of his female relations within such prohibited degree of kindred, whether by blood, by fosterage, or by marriage, as renders marriage with them invariably unlawful,—as if he were to say to her, [by a peculiarity in the *Arabic* idiom,] “you are to me like the *back* [*Zibr*] of my mother.” It is essential to *Zihâr* that the person compared be the wife of the speaker, inasmuch that *Zihâr* does not apply to a female slave; and competency to pronounce *Zihar* appertains only to one who is a *Musfulman*, of sound mind, and mature age, that pronounced by a *Zimmee* or an *infant* being nugatory; and its effect is to prohibit the person who pronounces it from carnal connexion with his wife, until he shall have performed an expiation.

IF

IF a man say to his wife “you are to me, like the back of my mother,” she [the wife] becomes prohibited to him, and his carnal connexion with her is unlawful, as well as every other conjugal familiarity, until he perform expiation for the same, as is enjoined in the sacred writings.

Zihâr prohibits carnal connexion until expiation.

IN times of ignorance (that is, before the establishment of the *Mussulman* faith,) *Zihâr* stood as a *divorce*; and the law afterwards preserved its *nature*, (which is *prohibition*;) but altered its *effect* to a *temporary* prohibition, which holds until the performance of expiation, but without dissolving the marriage.—The reason for this is that *Zihâr* is an offence, as being a declaration founded upon a falsehood, and which amounts to a *disowning* or *denying* of the wife; and therefore finds its proper punishment in her being rendered unlawful to him who pronounces it, by a prohibition which cannot be removed but by his performing expiation: and as carnal connexion becomes prohibited by *Zihâr*, so do all its accompanying privileges, such as kissing, touching, and other familiarity, lest the husband be tempted to the commission of the carnal act; in the same manner as is the rule with respect to relations within the prohibited degrees, with whom not only the carnal act itself, but also every familiarity which leads to the commission of it, are prohibited: contrary to that respecting women fasting, or in their courses, with whom although the commission of the carnal act itself be prohibited, yet other liberties are not so, as those situations are perpetually recurring to them, and if such a rule were to hold, it would operate as an almost continual restraint upon them; whereas, with respect to women under *Zihâr*, or within the prohibited degrees, this is not the case.

Nature and duration of *Zihâr*.

IF a man, having pronounced *Zihâr* upon his wife, have carnal connexion with her before he makes expiation, it behoves him to repent and pray forgiveness from God; but nothing is incumbent upon him, except the expiation on account of his *Zihâr*, as before, and that

If the prohibition occasioned by *Zihâr* be violated, yet no additional penalty is incurred.

Zihâr cannot
occasion di-
vorce.

that he refrain from any *repetition* of the carnal act with her until he perform such expiation, because it is related of the prophet that he thus commanded one who had committed the carnal act with his wife after *Zihâr*, and before expiation; from which tradition it appears that nothing more is incumbent, (in consequence of the commission of the carnal act before expiation,) for if it were so, the prophet would somewhere have mentioned it.—Let it be observed that from the words of the husband “you are to me like the back of my mother,” nothing but *Zihâr* is established, because the term employed expressly signifies *Zihâr*; and if he should *intend* divorce by it, yet that does not take place, as the law of divorce is broken through in this particular*, and consequently *Zihâr* does not admit of divorce being intended by it.

Zihâr is
established
by a compa-
rison with
any part of
the body
which implies
the whole
person.

IF a man say to his wife “you are to me like the *belly* of my mother,” or “the *thigh*,” or “the *pudendum*,”—*Zihâr* is thereby established, as *Zihâr* signifies the likening of a woman to a kinswoman within the prohibited degrees, which interpretation is found in the comparison being applied to any of the parts or members improper to be seen.—And *Zihâr* is in the same manner established, by the likening of the wife to any other kinswoman within such prohibited degree as that marriage with them is at all times unlawful, such as *sisters*, and *aunts*, and *foster-mothers*, who are invariably prohibited, as well as a natural mother. And so also, if a man say to his wife—“your *head* is to me like the *back* of my mother, or “your *pudendum*,” or “your *waist*,”—because by these the whole person is figuratively expressed: and so also if he were to say—“your *half*, or “your *third*,”—because in this case the effect is established in a diffusive portion†. and consequently extends to the whole person, be-

* That is to say, *Zihâr* has been made, by the law, a thing distinct and separate from *divorce*, and subject to a rule peculiarly applicable to itself.

† *Joozoo Shaë* is here rendered a *diffusive* portion, in opposition to *Joozoo Mayeen* a *particular* or *specified* portion.

cause, as the diffusive portion of any thing is a proper subject of all other acts, such as purchase sale and so forth, so is it of divorce; but divorce being incapable of division, is necessarily established in the whole person; and as *Zihar* resembles divorce, it therefore, like divorce, extends to the whole also.

WHERE a man says to his wife “you are to me like my mother,” it is requisite that his intention be examined into, so as to discover the true predicament in which the wife stands; and if he declare that his meaning was only to shew *respect* to his wife, it is to be received according to his explanation, because in speech respect may be expressed by a general comparison; or, if he declare his intention to have been *Zihâr*, that is accordingly established, for here appears a comparison with the whole person of his mother, in which her *back* is included; but as that is not expressly mentioned, the speaker’s intention is requisite to establish it; and if he declare his intention to be divorce, a divorce irreversibile takes place, as his comparing his wife with his mother is likening her to one who is prohibited to him, and is therefore the same as if he were to say “you are prohibited to me,” thereby intending divorce:—but if he declare that he had no positive intention, neither *Zihâr* nor *divorce* are established, (according to *Haneefa* and *Aboo Yoosaf*,) because the address bearing the construction of *respect*, must here be taken in that sense, as being of less importance than any other. *Mohammed* says that *Zihâr* is established independant of intention, because, a comparison of the wife with a *limb* or member of the mother occasioning *Zihâr*, it follows that, where it is made with *the whole*, *Zihâr* is established *a fortiori*.—With *Aboo Yoosaf*, if the intention of the husband be merely *prohibition*, an *Aila* only is established, because the prohibition by *Aila* is less rigorous than by *Zihâr*.—With *Mohammed*, on the contrary, *Zihâr* is established: his argument is taken from the *Arabic*.

A general comparison takes effect according to the husband’s explanation;

and the same
of a compari-
son in point
of prohibition.

IF a man say to his wife “you are to me *prohibited*, like my “mother,” intending either *Zihâr* or *divorce*, it takes effect according to his intention, as this address may be taken in either sense,—in that of *Zihâr*, as being a *comparison*,—and in that of *divorce*, as expressing *prohibition*, strengthened by the comparison. In this case, however, if he have no intention, according to *Abou Yoosaf*, *Aila* is established,—and, according to *Mohammed*, *Zihâr*,—as in the preceding case.—And if he say “you are to me *prohibited* like the back of “my mother,” and thereby intend divorce or *Aila*, yet nothing but *Zihâr* is established, according to *Haneefa*.—The two disciples say that whatever he may intend is established, as prohibition equally implies either *Aila* or divorce: according to *Mohammed*, however, where divorce is the intention, no *Zihâr* is established; whereas, according to *Abou Yoosaf*, divorce and *Zihâr* are both established together, (that is, divorce is established on account of the intention, and *Zihâr* on account of the term *Zibr* [back] being expressly mentioned, as was stated in its proper place.)—The argument of *Haneefa* is that the words above recited expressly signify *Zihâr*, and therefore do not bear any other sense; and the word *prohibited*, which is introduced there, relates solely to the prohibition by *Zihâr* as prohibition is of various kinds, of which that by *Zihâr* is one, and is on this occasion preferred, on account of the accompanying comparison with the back of the mother; and all other kinds of prohibition being only *constructive*, and that by *Zihâr* *positive*, the prohibition to which the word “*prohibited*” alludes, is to be taken as relating to the *Zihâr* only.

Zihâr has no
effect upon
any but a
wife.

ZIHÂR is not established with respect to any but the wife of the speaker, insomuch that if a man pronounce a *Zihâr* upon his female slave, it has no effect, for various reasons;—FIRST, God has said,—“MEN WHO PRONOUNCE *Zihâr* UPON THEIR WOMEN,”—where, by *women* is understood *wives*; SECONDLY, the legality of a female slave is of a *secondary* or *dependant* nature, and that of a wife of a *primary* or

or *original nature*, and hence those two persons must not be confounded; THIRDLY, *Zibâr* is an imitation of divorce, and divorce does not take place upon a slave.

IF a man marry a woman without her consent, and pronounce a *Zibâr* upon her before that be obtained, and she afterwards signify her consent, the *Zibâr* is void, because the husband, in making the comparison, said no more than what was, at that time, strictly true, and hence what he says does not amount to a *disowning* or *denying* of her.

OBJECTION.—It would here appear that the validity of the *Zibâr* remains suspended upon the woman's consent to the marriage, in the same manner as the manumission of the purchaser of a slave from an usurper rests upon the consent of the proprietor, (that is to say, where a person purchases a slave of the usurper of him, and emancipates him, the validity of his emancipation depends upon the proprietor's assenting to the sale,) because *Zibâr* is a right of possession by marriage, in the same manner as manumission is a right of possession by right of property.

REPLY.—The validity of the *Zibâr* is not suspended upon her consent to the marriage, because *Zibâr* is not one of the rights of marriage, as it has no place in the ordinances of the law *, whereas matrimony has a place in them, and that which is not of the law is incapable of appertaining as a right to that which is one of its ordinances: contrary to the case of manumission proceeding from the purchaser of a slave out of the hands of his usurper, as manumission is a right of property.

* That is, there are no particular rules instituted for it in the *Koran*, the laws respecting it being taken from the *Sonna*.

Zibâr collectively pronounced takes place upon every individual to whom it is addressed.

WHERE a man addresseth all his wives collectively, saying “ye are to me as the *back* of my mother,” *Zibâr* is established with respect to every one of them, he having on this occasion applied the *Zibâr* to them all indiscriminately,—as in divorce, where if a man direct a sentence of divorce to the whole of his wives collectively, it takes place upon the whole. And here an expiation is incumbent upon him, on account of each wife respectively, because prohibition has been established with respect to each; and expiation is ordained for the purpose of terminating and abolishing the prohibition; and where that is numerous the expiation must be so likewise, according to the number of prohibitions:—contrary to a case where a man pronounces an *Aila* (or vow of four months abstinence from carnal connexion) upon all his wives collectively, and breaks his vow by having carnal knowledge of them within the four months, for here a *single* expiation only is incumbent upon him, because in this case expiation is incumbent upon him out of respect to the honour and greatness of the name of God; and his name, in a vow of *Aila*, is mentioned *once* only, as it is pronounced by the man saying to all his wives “*by God* I will not have carnal connexion with you.”

SECTION.

Of EXPIATION.

A *Zibâr* may be expiated by the emancipation of a slave, &c.

THE expiation of a *Zibâr* may be effected by the emancipation of a slave;—or if, from not being possessed of such slave, this mode be impracticable, it may be effected by a fast of two months successively;

fively *; or if the state of the health do not admit of such fast, by the distribution of victuals to sixty poor men; because a passage which occurs in the *Koran*, respecting expiation, demonstrates the obligation of performing it in one or other of those ways: but the expiation is supposed to precede a man's touching his wife, after having pronounced a *Zihâr* upon her:—in expiation by *manumission* or *fasting* this is evident, because the text relates to that; and so also in expiation by the distribution of victuals to the *poor*;—because by expiation prohibition is terminated, wherefore it is necessary that the expiation be first made, in order that carnal connexion may be lawful.

It suffices for an expiation that a slave be released, whether that slave be an infidel or a *Mussulman*, an infant or an adult, a male or a female, because the word *Rakba*, in the *Koran*, applies equally to all of these, as it signifies one who is possessed, in right of property, by another, under any description whatever.—*Shafeï* says that the emancipation of an infidel does not suffice as an expiation, because this is a right of God, which cannot lawfully be expended upon one who, as being an infidel, is his enemy; like *Zakât*, which is a right of God, and the disbursement of which upon infidels, as being the enemies of God, is therefore illegal.—To this our doctors reply that the emancipation of a slave [*Rakba*] is what is mentioned in the text, and that is fulfilled by the manumission of an infidel: and as to what *Shafeï* advances, of expiation being a right of God, and therefore not to be expended upon his enemies, it may be replied that the intention of the expiation is to render the slave equal to the fulfilment of such duties as relate to God, that is to say, of *Zakât*, pilgrimage, bearing evidence, fighting for the faith, magistracy, and so forth; and if the slave be not a *Mussulman*, and continue an infidel after manumission,

The emancipation of a slave of any description suffices,

* By *Sawm*, or fasting, is here and elsewhere understood an abstinence from food and every carnal enjoyment from the rising to the setting sun of each day, within the prescribed term.

thereby

thereby enhancing his crime of infidelity, and precluding himself from receiving those advantages which he was qualified to enjoy through his freedom, it is to be attributed to the error of his choice, and not to any defect in the act of the expiator.

unless such
slave be de-
fective in one
of his facul-
ties.

It is not sufficient, as an expiation, to emancipate a slave who is blind, or maimed of both the fellow-members, whether hands or feet, because here such a slave is utterly deprived of one of his bodily endowments either of *seeing*, *carrying*, or *walking*, and the privation of any one advantage in a slave renders the manumission of him insufficient as an expiation, since a person in such a state is accounted *dead*: but where the privation is not *entire* it does not forbid the validity of the expiation, and hence it suffices for that purpose to emancipate a slave who is blind of one eye, or maimed of one hand or foot, or of an hand and foot from opposite sides, as this amounts not to an absolute privation of one of the advantages, but only to a *defect*: the case however is otherwise where he is maimed of a hand and foot upon the same side, for in this case his emancipation would not suffice, as this amounts to a privation of the advantage of *walking*, since, without the assistance of the hand upon the same side, that is impracticable.

The emanci-
pation of a
deaf slave
suffices:

It suffices, as an expiation, to emancipate a *deaf* slave. Analogy would suggest that this is not sufficient, as the slave is here deprived of one faculty; but it is admitted as sufficient, upon a favourable construction of the law, as the radical faculty still continues, since one who is considered as deaf may yet be capable of hearing what is spoken *aloud*: if, however, he cannot hear at all, (as where a person is born *perfectly deaf*,) his emancipation does not suffice.

but not that
of one who
has lost both
his thumbs,

It does not suffice, as an expiation, to emancipate a slave who has lost both his thumbs, as his power of *carrying*, which is one of his bodily endowments, is in that case destroyed.

NEITHER

NEITHER does it suffice to emancipate a slave who is insane, because no use is to be derived from the members of the body unless they be informed with reason, and therefore a privation of reason amounts to a privation of all the corporal endowments: but if the slave be one who is insane only at intervals, his freedom suffices for an expiation, as this circumstance is not an utter privation of the faculty, but only a defect in it, which does not prevent the sufficiency.

or who is *insane*,

(unless it be an *occasional* insanity only;)

It does not suffice, as an expiation, to emancipate a *Modabbir*, or *Am Walid*, as such are eventually entitled to their freedom, and hence their bondage is incomplete;—and so also of a *Mokâtib* who has fulfilled his contract of *Kitâbat* in part, because in this case his freedom must be accounted as in return for the part of his ransom already received, and consequently does not suffice for an expiation, as that is an act of piety, in which *speciality* is essential.—It is recorded as an opinion of *Haneefa* that the release of this *Mokâtib* is sufficient, as bondage is found to exist in him in every shape, and accordingly the contract of *Kitâbat* admits of being annulled: contrary to *Am Walids* and *Modabbirs*, as a *Tadbeer* or *Isfeelad* cannot be cancelled.

nor of a *Modabbir*, or *Am Walid*, or *Mokâtib*, who has paid part of his ransom.

If a person who pronounces *Zihâr* emancipate, for expiation, a *Mokâtib* who has not paid any part of his ransom, it suffices.—*Shafeï* says that it does not suffice, because the *Mokâtib* is a claimant of freedom, in virtue of the contract of *Kitâbat*, and is therefore the same as a *Modabbir*.—The argument of our doctors is that bondage exists in a *Mokâtib* in every shape, because the contract of *Kitâbat* is capable of annulment; and also, because the prophet has declared “a *MOKÂTIB* “is a slave as long as a single *DIRM* remains due from him.”

If a man purchase his father or his son, intending expiation thereby, it suffices.—*Shafeï* says that it does not suffice;—the same difference

That procured for a parent or child suffices;

ence of opinion subsists in the case of expiation of a *Yameen*, as shall be recited at large in treating of *vows*.

but not that
of a share in
a coparcena-
ry slave.

If a man, being rich, emancipate his half of a coparcenary slave, and then indemnify his partner for the value of the remainder, this does not suffice for an expiation with *Haneefa*.—The two disciples hold that it suffices, because the expiator, becoming possessed of his partner's share by indemnifying him, does in effect emancipate a slave who is entirely his own property:—but it were otherwise if the expiator be *poor*, as in this case it is incumbent upon the slave to perform *Siayet*, or emancipatory labour, for the partner's share; and hence the emancipation is, so far, *for a return*. The argument of *Haneefa* is that in this case the emancipation is defective in the proportion of the partner's share, until the transition of the property in it to the emancipator be effected by his indemnifying the other partner, and this circumstance forbids its sufficiency for an expiation.

The partial
emancipation
of a *sole* slave
(when fol-
lowed by the
emancipation
of the re-
mainder,)
suffices;

If a man emancipate half of his own slave, as an expiation, and afterwards emancipate the remainder for the same purpose, it suffices, as this amounts to no more than emancipating him by *two* sentences instead of *one*; and the defect which appears in the *second* half on account of the *first* half being already free is not regarded, since this defect has been induced upon the expiator's property, in consequence of his emancipating it *on account of expiation*, and a defect like this is not regarded; but is considered in the same light as when a man, having thrown a goat on its side for the purpose of sacrifice, happens to direct his knife into the animal's eye, so as to render it defective, which is not regarded, the sacrifice of the goat being still lawful, as the defect has befallen the property *on account of sacrifice*: contrary to the preceding case, because there the defect appears in the property of the other partner.—This proceeds upon the tenets of *Haneefa*.—With the two disciples manumission is indivisible, and consequently the emancipation

emancipation of *an half* is, in effect, the emancipation of *the whole* slave, so that it is not considered in that instance as proceeding from two sentences.

IF a man emancipate *half* his slave, as an expiation of *Zibâr*, and then have carnal connexion with the wife upon whom he had pronounced the *Zibâr*, and afterwards emancipate the *other* half, it is not valid as an *expiation*, according to *Hancefa*, because he holds that manumission admits of division, and the condition of its sufficiency, in the sacred writings, is that it be performed *before* the man touch his wife; but here the emancipation of one half takes place *after* touching.—With the two disciples, on the contrary, the emancipation of an *half* amounts to an emancipation of the *whole*, wherefore the emancipation in this case appears to take place upon the whole, *before* touching.

but not if carnal connexion take place between the two emancipations.

IF the person pronouncing a *Zibâr* be not possessed of a slave, his expiation may be made by fasting for two successive months, provided those do not include the *Ramzân*, nor the festival of *Fittir* *, nor the days of *Nibr* † or *Tashbreek* ‡. The fast must be *successive*, (that is, *uninterrupted*,) because it is thus expressed in the text; and it is a condition that the *Ramzân* be not included, because the abstinence observed in that period is not counted in expiation; for if it were to be so counted, this would in effect induce the annulment of a thing ordained by God; and it is also a condition that the festival of *Fittir*, and the days of *Nibr* and *Tashbreek*, be not included, as (these

Zibâr may be expiated by fasting two months;

* The day of breaking Lent.

† The day of *sacrifice*, being the tenth of the month *Zoal Hidjee*, when the pilgrims assemble at *Mecca*.

‡ The true sense of *Tashbreek* (as here applied) the translator has not been able to discover.

being ordained *festivals*) any extraordinary *abstinence* in them is forbidden.

but if carnal
connexion
take place
during the
fast, it must
be commen-
ced *de novo*.

IF the expiator, either wilfully or through forgetfulness, in the *night*, or from the *latter* cause, in the *day time*, should during the term of expiation have carnal connexion with the wife upon whom he had pronounced the *Zibâr*, he must again begin the fast anew, according to *Haneefa* and *Mohammed*. *Aboo Yoosaf* says that it is not incumbent upon him to begin it again, as his connexion with the wife does not amount to an interruption of the fast, since that is not broken by it; and if it be said that one condition of the fast is that it precede *touching*, it may be replied that a compliance with that injunction is here rendered impossible; he therefore holds that it must in this case suffice that a *part* of it precede *touching*, for if the fast be commenced anew (as is the doctrine of *Haneefa* and *Mohammed*) it follows that the *whole* would be subsequent to touching.—The argument of *Haneefa* and *Mohammed* is that the conditions of making expiation by fast are twofold;—*one*, that the fast precede touching;—*another*, that the two months be exempt from touching; and the second of these being violated by the connexion, the circumstance with respect to which the condition was made is not fulfilled, and therefore the fast must be commenced anew, because though the observance of the first condition be now rendered impossible, yet still it remains in his power to perform the expiation in such a way as may fulfil the *second* condition of it.

IF the expiator wilfully break his fast in the day time, within the two months, either with or without excuse, he must commence it anew, according to all the doctors, as this is an interruption of the fast, a condition of which is *that it be for two months successively*; and this being still in his power it is therefore incumbent upon him.

IF

IF a slave pronounce a *Zibâr* upon his wife, a fast of two months successively is the only mode of expiation which is allowed him, because he is incapable of possessing any thing in his own right as a proprietor, and consequently cannot expiate in any other way.—And here, if the owner of this person were to release another of his slaves, or to distribute victuals to sixty poor men, *on his behalf*, yet it does not suffice, as a slave, being incapable of possessing property, cannot be regarded as a proprietor, from his master's consignment or transfer of it.

Fasting the only mode in which a slave can expiate Zibâr.

IF the person pronouncing a *Zibâr* be incapable of observing a fast (from the ill state of his health or other cause) it is incumbent upon him to give victuals to sixty poor men, GOD having said “WHERE A MAN CANNOT FAST, LET HIS EXPIATION BE MADE BY DISTRIBUTING VICTUALS TO SIXTY POOR MEN.”—By the term *victuals* is here understood half a *Saa** of wheat, or one *Saa*† of barley or dates, or the value thereof in money; because the prophet has said “*for each pauper there is half a SAA of WHEAT;*”—and also, because regard is here had to the removal of want from each *for one day*, and consequently the proportion to each is determined by the *Sadka Fitter*, or alms given on the festival of breaking Lent.—Observe that what is here said, “*or the value thereof in money,*” is the opinion of our doctors, as has been related at large in the book of *Zakât*. And if the expiator bestow one *Man*‡ of wheat, or two *Mans* of barley, or dates upon the poor, it suffices, since this fulfils the design, as wheat and barley are of one and the same genus or nature, in respect to food, and consequently to compensate the defect in one grain by an addition of the other is lawful: contrary to a case where a man fasts, and at the end of a month becomes incapable of continuing the fast, on account of sickness, for here the expiation would not be effected by giving victuals to thirty paupers, because fasting and victuals are not

Zibâr may be expiated by the distribution of alms.

* About four pounds.

† About eight pounds.

‡ About eighty pounds.

homogeneous, and consequently the completion of one by means of the other is insufficient.

If the person pronouncing a *Zihâr* desire another person to distribute the victuals for him as an expiation, and the latter do so, it suffices, as this amounts to *borrowing* so much; and the pauper to whom the person so commissioned gives the victuals appears first to make seizure of them in behalf of the expiator, and then to receive them on his own account; thus the expiator is first seized of the property, and then makes it over to the pauper.

If the pronouncer of a *Zihâr* feed sixty paupers morning and evening it suffices, where they are filled, whether they eat more or less.—*Shafëi* says that this does not suffice, as it is requisite that the victuals be regularly consigned to sixty poor men, the same as in *Zakât* and *Sadka Fitter*, because in *consigning* their wants are more effectually relieved than by *feeding*, which is only an act of *permission*, and consequently cannot stand for *consignment*.—The argument of our doctors is that the word *Itaâm*, or feeding, is what is mentioned in the text, and the literal meaning of that is *to give a power over food*, which is found in *permitting* to eat, the same as in *consignment*: but in *Zakât* and *Sadka Fittir* consignment is essentially requisite, and mere permission does not suffice, because there the gift is incumbent, and by *gift* consignment is understood.—In short, with respect to whatever is mentioned in the sacred ordinances of the law under the term *victuals*, permission is sufficient; but in what is mentioned under the terms *gift* or *payment*, consignment is a condition.

If among the sixty paupers thus fed morning and evening there be an infant newly weaned from the breast, it does not suffice, as the expiation is not in that case completely performed, a child of this description not being yet able to eat a full proportion of victuals.

WITH

WITH barley-bread it is requisite that some provision be bestowed such as it is usual to eat with bread, as the appetite cannot be satisfied with that alone: but with *wheaten*-bread this is unnecessary.

IF victuals be given to *one* pauper for *sixty* days, it suffices, because the relief of *want* is what is required, and want recurs every day, wherefore giving it to the same person a *second* day amounts to giving it to a *second* pauper.—But if the victuals for sixty be given at once to a single pauper, it does not suffice:—yet if they be given to him at sixty separate times within the day it suffices, according to some; but others alledge that it does not suffice.

IF the person pronouncing a *Zihâr* have carnal connexion with his wife within the time of his performance of expiation by alms, as above, still it is not necessary that he should recommence, as it is not set forth as a condition in the word of God that this species of expiation should precede *touching*: but it nevertheless behoves him not to touch her until he shall have made expiation, as it is possible that in the interim he may be enabled to perform that by the manumission of a slave, or by fasting for two months, in which case this would induce expiation by those methods after touching, contrary to the injunction of the text.

Carnal connexion during expiation by alms does not require that the alms be distributed anew.

IF a man, as an expiation for two *Zihârs*, distribute to each of sixty paupers a double proportion of victuals, (suppose one *Saa* of wheat to each,) yet this does not suffice for more than one *Zihâr*, according to the two *Elders*.—*Mohammed* says it suffices for both.—But if the victuals be bestowed in this way upon sixty paupers, as an expiation for the breach of a fast, and for *Zihâr*, it suffices for both.—The argument of *Mohammed* is that what is bestowed upon the paupers aforesaid suffices for the performance of both expiations, and

the persons upon whom it is bestowed are also proper subjects of both expiations, and consequently the act is effectual for two expiations, in the same manner as where the occasions of expiation are different, (as in the case of expiation for a breach of fast and a *Zihâr*,)—or where the expiations are separately performed. The argument of the two *Elders* is that the *intention*, where things are of one and the same nature, is nugatory; but regard is had to it, when things are *different* in nature, because a respect to intention is ordained, for the sake of distinguishing between different things; and hence, if atonement were due from a person for the neglect or omission of two days fast, in the month of *Ramzân*, (a *Thursday* and a *Friday*, for instance,) and the person by fasting afterwards two days *intend* atonement, it suffices, although the days on which he thus fasts be not the same with the days of omission, because the thing is essentially the same: contrary to where a person owes one day's fast for *atonement*, and another day's fast *in pursuance of a vow*,—for then a distinction is necessary, because of the difference between the things: now as the *intention*, where the things are of the same nature, is nugatory, and as the thing bestowed is capable of constituting a *single* expiation only, (because half a *Saa* of wheat to each pauper is ordained as the smallest amount sufficient towards expiation, wherefore the expiation is vitiated by being *under*, but not by *exceeding*, the prescribed quantity,) it follows that the distribution of victuals as aforesaid is effectual towards one expiation only, the same as where a single expiation only is intended:—contrary to where the victuals are bestowed at separate times, because giving a *second* time is the same as giving to *another pauper*.

If the man upon whom two expiations of two *Zihârs* are thus incumbent emancipate two of his slaves, it suffices, although he have no specific intention as to either the slaves or the *Zihârs*, respectively:—and in like manner, if he fast for four months, or distribute victuals to one hundred and twenty paupers, it suffices, because, as the *thing* is the *same*, specific *intention* is not requisite.

IF, moreover, this man emancipate a single slave in part of expiation of two *Zibárs*, it rests with him to specify to which of the two he intends the manumission of that slave to apply: but if he were thus to emancipate a slave in part of expiation of a *Zibár*, and of a *Murder*, it is invalid with respect to either. *Ziffer* says, that the emancipation of a single slave is totally ineffectual in either case.—*Shafëi*, on the other hand, maintains that it is equally efficient in both cases, the specification resting with the expiator, because all expiations are of one and the same nature with respect to their *end*, which is the covering of criminality, but as intention with respect to things similar in nature, is unavailable, the simple intention remains; and as (if that were expiation) the expiator is at liberty to specify to which expiation the act is to apply, so here also.—The argument of *Ziffer* is that the expiator in this case appears to have emancipated half his slave on account of one *Zibár*, and the other half on account of the *other Zibár*, and consequently, that he is not at liberty afterwards to specify his emancipation as applying to either *Zibár* in particular, after having granted it as applying to *both*, since he then possesses no further option.—Our doctors argue (with *Shafëi*) that specification, with respect to things similar in nature, is unavailable, and consequently nugatory, wherefore simple *intention* remains; but where things are *different* in nature, (such as the emancipation of a slave, as an expiation for *Zibár*, and also for *homicide*,) the specification of intention is available; and the intention being approved, the emancipation of the slave does not apply wholly either to the expiation for *Zibár*, or to the expiation for *homicide*.—As to what *Shafëi* advances, that all expiations are of one and the same nature, in regard to their *end*, it may be replied that a difference of nature between the expiations, in the present case, subsists in regard to the *different occasions* of them, although in respect to their *end* they be of one and the same nature.

C H A P. X.

Of *Laân*, or *Imprecation*.

Definition of
the term.

LAÂN, in the language of the law, signifies testimonies confirmed by oath, on the part of a husband and wife, (where the testimony is strengthened by an imprecation of the *curse* of God, on the part of the husband, and of the *wrath* of God, on the part of the wife,) in case of the former accusing the latter of adultery.

A man ac-
cusing his
wife of
whoredom
must verify
his charge by
an impreca-
tion.

If a man slander his wife, (that is to say, accuse her of whoredom,) or deny the descent of a child born of her, by saying “this is “not my child,” and she require him to produce the ground of his accusation, imprecation is incumbent upon him, provided both parties be competent in evidence,—(that is, of sound mind, adults, free, and *Mussulmans*,) and that the woman be of a description to subject her slanderer to punishment, (that is, *married**,) for if she be not such, (as if she have been, for instance, enjoyed under an invalid marriage, or delivered of a child whose father is unknown,) the man is not under any obligation to make an imprecation, although she be a person competent in evidence.

* Arab.—*Mahfana*.—For a full definition of this term see SLANDER.

LAÂN, according to the tenets of our doctors, is a testimony confirmed by oath, as was before observed; and it involves, on the part of the husband, if his accusation be false, *the CURSE of God*, which stands as a substitute of punishment for slander,—or, on the part of the woman, *the WRATH of God*, which stands in the place of punishment for whoredom, if it be true:—it is therefore requisite that the parties be both competent in evidence, as the ground thereof is *testimony*; and it is also requisite that she be of a description to subject her slanderer to punishment, as the *Laân*, with respect to the husband, stands as a substitute of punishment for slander, (whence the necessity of her being a *married* woman :) and *Laân* is incumbent on account of the denial of a child, because the husband, in denying the child's descent, accuses his wife by implication.

Conditions
under which
the imprecation
is in-
cumbent.

OBJECTION.—The denial of the child's descent does not positively imply an accusation of the wife, as it is possible that the child may not have been begotten by the husband, and yet that the wife is not an adultress, (as where a man, for instance, has had carnal connexion with her erroneously, and a child is produced from it, in which case the child is the undoubted progeny of another,) and hence, in his denial of its descent from him, the husband speaks truly, without any accusation of adultery against the wife being implied.

REPLY.—This possibility is of no weight, because a stranger, if he were to deny the descent of a child from the known and reputed father, is held to be a *slanderer* notwithstanding this possibility; and so in this case also.—It is also a condition of imprecation that the wife require her husband to produce the ground of his accusation, as this is her right, the demand of which is necessary, as well as that of all other matters of right; and if he decline it, the magistrate must imprison him until he either make an imprecation, or acknowledge the falsity of his charge, by saying “I falsely attributed adultery to her,”—as this is a right due from him to his wife, and which it is in his power to render to her, wherefore he is to be imprisoned till such time as he does what is incumbent, or acknowledges his falsity, so as

that the occasion for the imprecation may be removed, (that is, the condition of imprecation, namely, the mutual charge of falsehood,) because imprecation is not incumbent except where each charges the plea of the other with falsehood, after the husband having produced against his wife an accusation of adultery. And the husband having made an imprecation, the same is then incumbent upon the wife, it being so ordained in the *Koran*; (but imprecation commences with the husband, as he in this case appears as the plaintiff;) and if she decline making imprecation, the magistrate is to imprison her till such time as she either agrees to make it, or to acknowledge her husband's veracity, this being his right incumbent upon her, and which she is able to render, wherefore she is to be imprisoned until she renders it.

Not incum-
bent upon
slaves or infi-
dels;

If a slave, or an infidel, or one who has suffered punishment as a slanderer, accuse his wife of whoredom, punishment for slander is due upon him, because here imprecation is impossible *, and consequently its original is due, and this is punishment for slander, that being the original ordinance in this case, according to the word of God,—“ IF
“ MEN ACCUSE MARRIED WOMEN OF WHOREDOME, AND PRODUCE
“ NOT FOUR WITNESSES, SCOURGE THEM WITH EIGHTY STRIPES;”
now imprecation is the substitute of punishment for slander; and where the substitute cannot be had the original is due.

nor, where
the wife is a
slave, an in-
fidel, or a
convicted
slanderer;

If the accuser be a person competent in evidence, and his wife be a slave, or an infidel, or a *Kitabee*, or one who has suffered punishment as a slanderer, or of the description of those whose accusers are not liable to punishment, as being an infant, or idiot, or adultress, punishment is not due, nor is imprecation incumbent upon him, as in this instance neither competency in evidence nor marriage

* As infidels and slaves, not being competent to give evidence, are incapable of imprecation.

(in

(in the sense which induces punishment) are attached to the accused.

OBJECTION.—It would appear that in this case punishment for slander is due upon the husband, as imprecation is a substitute for that, and where the substitute cannot be had, it follows that the original is due.

REPLY.—Punishment is not due upon the husband, as he is capable of imprecation, the obstacle to which exists in this case on the part of the wife, and this circumstance precludes punishment, in the same manner as where she acknowledges the truth of the accusation.—The foundation of this is a saying of the prophet, namely, “*There are four descriptions of women with respect to whom imprecation is not incumbent, Jews and Christians married to Muslims, and slaves married to freemen, and free women married to slaves.*”

If the accuser and his wife be persons who have both already suffered punishment for slander, punishment is due upon the former, because in this case a reason is found against imprecation on the part of the accuser, he being incapable of making it.

nor where
both parties
are convicted
slanderers.

THE manner of imprecation is as follows.—The *Kázee* first applies to the husband, who is to give evidence four several times, by saying “*I call God to witness to the truth of my testimony concerning the adultery with which I charge this woman;*” and again, a fifth time, “*may the curse of God fall upon me if I have spoken falsely concerning the adultery with which I charge this woman;*”—after which the *Kázee* requires the woman to give evidence, four separate times, by saying “*I call God to witness that my husband’s words are altogether false, respecting the adultery with which he charges me;*” and again, a fifth time, “*may the wrath of God light upon me, if my husband is just, in bringing a charge of adultery against me.*”—*Hasan* records it as an opinion of *Haneefa* that the husband

Form of imprecation,
and the manner of making it.

When both parties have made imprecation, a separation takes place.

should, in making the imprecation, address himself in the second person, saying "by God I speak truly concerning the adultery with which I charge *you*," because the use of the second person does not admit the possibility of the address affecting any other. The reason for the form, as above stated, is that the *relative*, when joined to the *third person*, removes doubt. And on both making imprecation in this manner, a separation takes place between them; but not until the *Kâzee* pronounces a decree to that effect.—*Ziffer* says that separation takes place upon the imprecation, independent of any judicial decree, because a *perpetual prohibition* is established by it, the prophet having said "*the two who make imprecation can never come together*,"—which proves their separation, as the prophet's forbidding their ever coming together after imprecation expressly declares this. The argument of our doctors is that as, in consequence of the establishment of a prohibition between them, the retaining of the woman *with humanity* * is impossible, it is incumbent upon the husband to divorce her on a principle of benevolence; but if he decline so doing, it then behoves the *Kâzee* to issue a decree of divorce, as the *Kâzee* is the substitute of the husband in this matter for the purpose of removing injustice: and a proof of this is that *Aweemar* divorced his wife after imprecation, in the presence of the prophet, which shews that the marriage still continued and was not virtually dissolved by the imprecation, otherwise the prophet would have prevented him from pronouncing divorce.—Observe that the *separation* here mentioned is an irreversible divorce, according to *Haneefa* and *Mohammed*, because the act of the *Kâzee* must be referred to the husband, as in cases of *impotence*.

The husband, on receding from his im-

If, after imprecation, the husband should acknowledge that his accusation was false, by saying "I falsely laid adultery to her charge,"

* Alluding to the words of the *Koran*,—"RETAIN THEM WITH HUMANITY, OR DISMISS THEM WITH KINDNESS. (See *Rijât*.)

he

he becomes *privileged* with respect to her, that is to say, it is lawful for him to marry her as well as any other person *. This is according to *Haneefa* and *Mohammed*.—*Abou Yoosaf* says that she is for ever prohibited to him, and that he cannot marry her,—the prophet having said “*two who make imprecation can never come together,*” which shews the separation established between them to be *perpetual*; wherefore his marriage with her is illegal.—The argument of *Haneefa* and *Mohammed* is that the husband’s acknowledgment is a retraction from his evidence, (that is, from his *imprecation*,) and evidence is by subsequent retraction rendered null and of no effect: and as to the saying of the prophet above cited, it means that the parties cannot come together *as long as they both persevere in their imprecation*; but after the husband’s acknowledgment, the imprecation no longer remains either in substance or in effect, and consequently they may then come together.

precation,
may again
marry his
wife.

IF a husband accuse his wife, by denying her child, it is requisite that the *Kâzee* issue a decree denying the descent of the child from him and affixing it upon the mother †; and the manner of the imprecation here is that the *Kâzee* first makes the husband give evidence, saying “I testify in the sight of God that I speak truly concerning the matter I have brought against her, in denying the child;” after which he makes the wife give evidence in the same manner, saying “I call God to witness that he speaks falsely concerning the matter he has brought against me, in denying the child.”

Imprecation
occasions a
decree of
bastardy.

IF a husband accuse his wife, both by bringing a charge of adultery against her, and also by denying a child born of her, it is necessary that both these circumstances be mentioned in the imprecation, after

* That is, without her being previously married to another.

† That is, *bastardizing* it.

which

which the *Kázee* is to issue a decree, denying the descent of the child from the husband, and fixing it upon the mother, because the prophet once so decreed upon such an occasion, and also, because the design of the imprecation in this case is to bastardize the child, wherefore a decree must be passed agreeably to the design of it.

A DECREE of separation between the parties comprehends a decree of bastardy in respect to the child.—It is recorded as an opinion of *Abou Yoosaf* that, in a decree of separation, a decree of bastardy is not comprehended, but that it is requisite that the magistrate first effect the separation, and then say “I throw the child upon the mother, and “remove it from the father’s house;” because separation may sometimes take place without affecting the descent of children, as where a man accuses of adultery a wife who has children *, in which case a separation is established by imprecation, but bastardy is not induced upon the children: the *Kázee*’s mention of bastardy is therefore requisite.

A husband
receding
from impre-
cation must
be punished
for slander.

IF a husband, after imprecation, contradict himself, by acknowledging that he had accused his wife falsely, let the magistrate punish him, because he then acknowledges himself liable to punishment: and it is afterwards lawful for the husband to marry her again, (according to *Haneefa* and *Mohammed*,) because, having once suffered punishment for slander, competency to make imprecation no longer appertains to him; and the prohibition which is the effect of the imprecation is removed. In the same manner, if the husband and wife make imprecation, and the husband afterwards accuse of adultery a strange woman, who is married, and suffer punishment on that account, it then becomes lawful for him to marry his wife again, for the reason aforesaid. And so also, if the wife, after divorce in consequence of imprecation, be found in adultery, and suffer correction from the *Kázee*

* Meaning, children already born, before the period of the husband’s accusation.

on that account, it then becomes lawful for the husband to marry her again, as competency to make imprecation no longer appertains to her.

IF a man accuse his wife, she being an *infant* or an *idiot*, imprecation is not incumbent upon the parties, because the accuser of such a person is not liable to punishment for slander unless he be a *stranger*: imprecation, therefore, is not incumbent in the accusation of such wives by their husbands, as it is the substitute of punishment for slander. And the rule is the same where the husband is insane, or an idiot, because such an one is not competent in evidence.

Imprecation not incumbent where the husband or wife is an *infant*, or an *idiot*;

IF a dumb person accuse his wife, imprecation is not incumbent, because imprecation is not incumbent unless the accusation be expressed *in terms*, as is the case in slander, where punishment is not incurred unless the accusation has been expressly made.—*Shafei* opposes this; for he holds that punishment is due upon the accusation of a dumb person, and consequently, that imprecation is incumbent, because his *signs* are the same as the *words* of one who has the power of speech: but the argument of our doctors is that the signs of a dumb person are not altogether free from doubt, and punishment is removed by any circumstance of doubt.

or where the husband is *dumb*;

IF a man say to his wife “your pregnancy is not of me,” imprecation is not incumbent.—This is the opinion of *Haneefa* and *Ziffer*: and the reason upon which they found it is, that the circumstance of *pregnancy* does not admit of being *positively certified*, wherefore the husband’s words do not convey an immediate accusation.—The two disciples say that imprecation is incumbent in this case, provided the woman be delivered of a child within six months; and it is this which is meant by what is said in the *Mabsoot* that “the existence of pregnancy at the time of accusation may be certified;” but to this we reply that where the accusation cannot be immediately established, it must

or where the accusation is indirectly insinuated.

must remain suspended upon a condition, in the same manner as if the husband were to say to his wife “*if* you produce a child it is not “mine;” and the suspension of accusation upon a condition is nugatory.

But if he were to say to her “you are an adulteress, and your pregnancy proceeds from adultery,” imprecation is incumbent upon both parties, as accusation is here established in the mention of adultery. Yet the *Kâzee* is not in this case to issue any decree affecting the descent of the foetus.—*Shafeï* says that a decree of bastardy must be pronounced, because the prophet decreed a bastardy in the instance of *Hillâl* who had accused his pregnant wife.—The argument of our doctors is that the effect of a decree of bastardy cannot take place until after delivery, since before delivery there is a possibility of doubt respecting the pregnancy; the *Kâzee*, therefore, is not to decree a bastardy.—As to the decree of the prophet quoted by *Shafeï*, it is possible that the prophet may have been certified of the woman’s pregnancy by *inspiration*.

Imprecation made *posterior* to the birth of a child does not affect that child’s descent.

If a husband deny the descent of the child upon the near approach of birth, or at the time where it is usual to receive congratulations, and to purchase clothes and make preparations for it, his denial holds good, and imprecation is incumbent upon him on account of it: but if he do not deny it until afterwards, although imprecation be here also incumbent, yet the descent of the child remains established in him.—This is the doctrine of *Haneefa*.—The two disciples say that the denial is admitted during labour, as it is admitted within a *little* time, but not within a *long* time, and hence a distinction is made between the shorter period and the longer, by the time of labour, as the pains of labour are among the effects of breeding.—The argument of *Haneefa* is, that it is impossible to fix any time, because time is fixed for the purpose of consideration, and mankind vary in the length of time necessary for that purpose; wherefore regard is had to a thing which
shews

shews the child to be his, namely, his receiving the usual congratulations, or remaining silent at the time of such congratulations, or purchasing things to prepare for the birth, or letting that time pass without denying it.—This is where he is present; but if he be absent, and ignorant of the birth of the child, and afterwards come, the time aforesaid is regarded, according to both authorities; that is to say, with *Haneefa*, it remains to him to deny the child within such space of time as congratulations are admitted,—and with the two disciples, within the space of time which corresponds with a woman's labour.

IF two children be produced at one birth, and the husband deny the descent of the *first*-born, and admit that of the *second*, in this case the parentage of *both* is established in him, because they are both supposed to be begotten from one seed; and punishment is due upon the husband, because he has contradicted himself in acknowledging the *second* child; and if he admit the *first*, and deny the *second*, the parentage of both is established in him for the same reason: and imprecation is here incumbent, because his denial of the second child implies an accusation from which he does not afterwards retract, (as in the former instance,) since his virtual declaration of his wife's chastity, in acknowledging the parentage of *one* of the children, here precedes the accusation, being the same as if he were first to say "*she is chaste*," and then to say "*she is an adultress*," in which case imprecation would be incumbent, and so here likewise.

C H A P. XI.

Of *Impotence*.

An impotent husband must be allowed a year's probation, after which separation takes place.

IF a husband be *Inneen*, [impotent,] it is requisite that the *Kâzee* appoint the term of one year from the period of litigation, within which if the accused have carnal connexion with his wife it is well; but if not, the *Kâzee* must pronounce a separation, provided such be the desire of the wife, because the same is recorded from *Alee*, and *Omar*, and *Ebn Musfood*,—and also, because the woman is entitled to the carnal enjoyment, and it is possible that the husband may be incapacitated from the performance of that act, not only by a radical infirmity, but also by some supervenient and accidental cause, whence it is necessary that some certain term be appointed, in order that the true reason of his inability may be ascertained;—and this term is fixed at one year, because that contains four seasons, and diseases are principally occasioned by an excess either of heat, cold, dryness, or humidity, qualities which are peculiar to each season respectively; and it is probable that one of these four may particularly agree with the man's constitution, so as by its influence to dissipate his disease; thus it may be ascertained, when a year has completely elapsed, whether his inability proceeded from any radical infirmity, in which case, it is impossible to *retain* the wife *with humanity**, and hence it is incumbent upon the husband to separate from her, upon a principle of benevolence: but if he should not do so, the *Kâzee* is in that case to pronounce a separation, as his substitute; yet it is requisite that the wo-

* Alluding to the words of the *Koran* before mentioned.

man *desire* such separation, as it is her right.—The separation here mentioned amounts to the execution of a single divorce irreverfible, because the act of the *Kázee* is attributed to the husband, whence it is the fame as if he had himself pronounced such a sentence upon her. *Shafei* alleges that this separation is an annulment of the marriage; but with our doctors marriage is held to be incapable of being annulled *of itself*, although it may be annulled *by effect*, in the fame manner as in the case of a husband's apostacy. And this separation amounts to an *irreverfible* divorce, not a *reverfible*, because the intent of it is the woman's relief from a hardship, which cannot be effected but by complete divorce; for if it were not so, it would still remain in the husband's power to reverse it, which would defeat the design.

THE wife, in the case here mentioned, is entitled to her whole dower, if the husband should ever have been in *retirement* with her, because retirement with an *Inneen* is accounted a *Khalwat Saheeb*, or complete retirement, as well as with any other person; and an *Edit* is incumbent upon her, as was mentioned in a former place.—What is here advanced proceeds upon a supposition of the husband acknowledging that he has not performed the carnal act with his wife: but if he controvert her plea, asserting that he has copulated with her, and she have been married as a *Siyeeba*, his affirmation upon oath is to be credited, because he is the defendant against her claim of separation, and the affirmation of a defendant must be credited when given upon oath: moreover, the instrument of generation is originally created free from inability or disease, and it is natural that he should perform the carnal act where no obstruction exists; and the declaration of a person is to be credited when apparent circumstances bear testimony to his veracity, and where he rests his cause upon the nature of things. If therefore the husband thus make oath, the wife's right of separation is thereby defeated; but if he decline this, the term of a year is then to be appointed as aforesaid. Where she was married as a *virgin*, she is to be examined by some of her own sex, and if they declare her to be

and the wife retains her whole dower, if the husband should ever have been in retirement with her,—but

the wife's claim of separation may be here defeated by the husband swearing that he had enjoyed her.

still a virgin, the term of a year is to be appointed, as above, because the husband's falsehood is then evident; but if they declare her muliebrity *, the *Kázee* is in that case to require the husband to make oath, which if he do, her right to separation is defeated; but if he decline, decision is to be delayed for a year as above.—All that has here been said supposes the husband to be merely *Inneen* or *impotent*: but if he be a *Majboob*, or complete eunuch, (that is, one deprived both of *yard* and *testicles*, or of the *former* only,) the *Kázee* is to pronounce an immediate separation, (where such is the woman's desire,) because in this case the delay of a year can be attended with no advantage: if, however, he be only a *Khassee*, or simple eunuch, (that is, *castrated*,) decision is to be deferred for a year, as in a case of impotency, because there the yard still remains, with which it is possible that he may perform the act.

Rules to be
observed at
the expiration
of the year
of probation.

WHERE the term of a year is appointed for the trial of a man charged with impotence by a wife whom he had married as a virgin, and he declares, at the expiration thereof, that he has had carnal connexion with her within that interval, and she denies this, she is then to be examined by some of her own sex; if they pronounce her to be still a virgin, she has it at her option either to separate from her husband, or to continue with him, because the testimony of the examiners is confirmed by her virginity, that being the original state of every woman; but should they declare her muliebrity, the husband is then to be required on the other hand to make oath, which if he decline, she has an option, as above, her plea being strengthened by the circumstance of his declining to swear; but if he swear, she has no option. If, moreover, she was a *Siyeeba* originally, (that is at the time of marriage,) and the husband declare that he has had carnal connexion with her within the year of probation, and she deny this, his declaration upon oath is to be credited,—that is to say, the oath is to be

* Meaning *womanhood*, as opposed to *virginity*.

tendered to him, which if he take, she has no option; but if he decline it, she has then an option as already stated. And here, if she chuse to continue with him, she has no subsequent option, as by so doing she manifests an assent to the relinquishment of her right.

THE year of probation appointed by the *Kázee* in cases of impotence is to be counted by the *lunar* calendar; this is approved; and the days of the courses, and of religious fasts, (such as *Ramzán*,) are therein included, as these occur in all years alike, nor can a year pass without them; but the days of *sickness* of either party are not included, as a year may pass exempt from such an occurrence.

The year of probation to be calculated by the *lunar* calendar.

If the defect be on the part of the *woman*, the husband has no right to annul the marriage*.—*Shafēi* maintains that he may annul it, and put her away on account of any of the five following defects, namely, *leprosy*, *scrophula*, *madness*, *Ritk* †, or *Karrn* ‡, because some of these (such as the two latter) are obstructive of generation; and others (such as the three former) are causes of natural and insuperable aversion, as is confirmed by a tradition of the prophet, who has said “*flee from LEPERS as ye would from a WILD BEAST.*”—The argument of our doctors is that if the enjoyment of the wife’s person were to be totally precluded by any circumstance, (such as *death*, for instance, before retirement,) yet the marriage is not annulled, but is rather established and confirmed, insomuch that the whole dower remains due; and hence, where such privation of the connubial enjoyment is merely *dubious*, on account of its being occasioned only by a

A husband cannot annul the marriage, where the defect is on the part of the wife.

* That is, *to break it off*, so as to destroy the woman’s claim to her dower, which could not be done by divorce.

† *Vulva impervia coeunti.*

‡ A bone, or other unnatural excrescence, *vulva anteriore parte enascens.*

defect in the subject, it remains unannulled, *a fortiori*, upon this ground, that the design of matrimony is to *legalize generation*, and the connubial enjoyment is the advantage proposed in it; and the ability to perform the act, where any natural obstruction exists, may be obtained, as in a case of *Ritk* or *Karn*, (for instance,) which are to be remedied by chirurgical operations; and in all other cases the ability is evident.

A wife cannot sue for a separation on the ground of her husband being leprous, scrophulous, or insane.

If the husband be *lunatic*, *leprous*, or *scrophulous*, yet his wife has no option, as in cases where he is an eunuch or impotent. This is according to *Haneefa* and *Aboo Yoosaf*. *Mohammed* says that she is entitled to an option, in order that she may remove an evil from herself: contrary to the case of a *husband*, he having it in his power, in similar circumstances, to relieve himself by *divorce*.—The argument of the two *Elders* is that in marriage no right of option originally exists, for if this were allowed, it would operate to the destruction of the husband's right; and it is admitted in the case of *eunuchs*, or of persons *naturally* impotent, only because the circumstance of *natural* or *accidental* infirmity tends to defeat the end for which marriage was instituted; but with persons of the descriptions now under consideration this reason does not hold, as the husband who labours under any of those defects is still capable of generation, whence an evident difference appears between the two cases

C H A P. XII.

Of the *Edit*.

By *Edit* is understood the term of probation incumbent upon a woman in consequence of the dissolution of marriage after carnal connexion: the most approved definition of *Edit* is, *the term by the completion of which a new marriage is rendered lawful.*

Definition of
the term.

WHEN a man repudiates his wife, being a free woman, either by a *reversible* or an *irreversible* divorce, or when separation takes place between a husband and wife, without divorce, after carnal connexion, the *Edit*, or woman's term of probation, consists of three terms of her courses, provided she be one who is subject to the menstrual discharge, God having so commanded in the *Koran*.—The separation which takes place between a married couple, independant of divorce, bears the same construction as divorce, because the *Edit* is made incumbent in a case of divorce for the purpose of ascertaining whether the woman be pregnant, and the same necessity occurs where separation takes place between a husband and an enjoyed wife without divorce.—The separation without divorce may be occasioned either by a woman admitting the son of her husband to carnal connexion, or by her apostatizing from the faith.

The *Edit* of
divorce of a
free woman is
three menstru-
ations;

and of one
not subject to
courses, *three*
months;

and, of one
who is *preg-*
nant, the term
of her travail:

THE *Edit* of a woman who, on account of extreme youth, or age, is not subject to the menstrual discharge, is three months, because God has so ordained in the sacred writings.—The *Edit* of a pregnant woman is accomplished by her delivery, whether she be a *slave* or *free*, because God, in the sacred writings, has so ordained respecting woman in that situation.

that of a slave
is *two* men-
struations:

THE *Edit* of a female slave is two terms of her courses, because it is thus mentioned in the traditions, and also, because bondage is restrictive to the *half*, whence it would appear that the *Edit* of a slave should be only *one term and a half* of her courses, but the menstrual discharge being incapable of subdivision, the half is, of necessity, made a *whole term*, and hence the *Edit* of such an one is *two* terms; and it is to this that Omar adverts, where he says “I would if possible fix the *Edit* of a female slave at *one and an half* of her courses.”

and of one
not subject to
courses a
month and an
half.

—Where the female slave is one who from extreme youth or age is not subject to the menstrual discharge, her *Edit* is one month and an half, because *time* being capable of subdivision, the term is fixed at the *half* on account of her bondage.

Edit of
widowhood:

THE *Edit* of a free woman upon the decease of her husband is four months and ten days, such being the term mentioned in the *Koran*;—and that of a female slave in the like circumstance is two months and five days, bondage being restrictive to the half.

Case of *Edit*
of widowhood
after divorce.

IF a man divorce his wife upon his deathbed, so as that she still inherits of him*, *Haneefa* and *Mohammed* say that her *Edit*, in consequence of his decease, is four months and ten days, if she complete three terms of her courses within that period; but if the three terms be not accomplished, as requiring a longer *time*, (*five months* for instance,) her *Edit* is in that case three terms of her courses, what-

* See Chap. IX.

ever time those may require. In short, here are two terms; one, that of four months and ten days; and the other, that of three menstruations; and which ever of these is the longest, the same is the term of *Edit*.—*Aboo Yoosaf* says that the *Edit* of this woman is three menstruations.—This difference of doctrine obtains where the sick person has repudiated his wife by one divorce irreverfible, or by three divorces:—but where the divorce is *reverfible*, the *Edit* is four months and ten days, according to all the doctors. The argument of *Aboo Yoosaf*, in fupport of his doctrine, as above, is that the marriage had been diffolved and terminated by the divorce, previous to the deceafe of the husband, and the *Edit* of divorce is three terms of the courfes, whence fuch is the *Edit* incumbent in the prefent cafe, as that of four months and ten days, (being the *Edit* of *widowhood*,) is required only where the marriage was diffolved by the husband's deceafe; but in the prefent cafe it was diffolved *before* his death, by *divorce*. To this indeed it may be objected that, if the marriage be diffolved before the husband's deceafe, it would follow that the wife cannot inherit:—but the marriage is accounted to hold in refpect to *inheritance* only, and not fo as to alter or affect the *Edit*:—contrary to where a dying husband repudiates his wife by a *reverfible* divorce; her *Edit* in that cafe being univerfally held to be ftrictly an *Edit* of *widowhood*, fince the marriage then actually continues in *every* fhape.—The argument of *Haneefa* and *Mohammed* is that the marriage being here accounted to continue with refpect to *inheritance*, is alfo accounted to continue with refpect to *Edit*; and hence the longest of the two is regarded.—If a man be put to death for apoftacy fo as that his wife inherits of him, the fame difference of opinion obtains refpecting her *Edit* as is above recited.—Some commentators allege that her *Edit* is held to be three terms of her courfes by all the doctors, as her marriage is not accounted to continue to the time of her husband's deceafe with refpect to *inheritance*, fince a *Muffulman* woman cannot inherit of an infidel: but yet the wife does here inherit, becaufe her claim to inheritance is

established upon the instant of her husband's apostacy;—her *Edit*, therefore, is three terms of her courses.

A female slave, emancipated during *Edit*, must observe the *Edit* of a free woman.

If a master emancipate his female slave, whilst in her *Edit* from a *reversible* divorce, she is in that case under *Edit* as a *free woman*, and must count it accordingly; because, in reversible divorce, so long as the *Edit* is unaccomplished, marriage continues in every shape:—but if a master emancipate his female slave, whilst in her *Edit* from a divorce *irreversible*, or from the decease of her husband, her *Edit* is not affected or altered by such emancipation;—that is, it does not become the *Edit* of a *free woman*, because her marriage has been completely dissolved by the irreversible divorce, or by the husband's death.

Rule of *Edit* with a woman past child bearing.

If an *Ayeesa* * be in her *Edit*, counting it by months, and the menstrual discharge should chance to appear upon her, in this case all regard to that portion of the *Edit* which has been counted by months drops, and her *Edit* commences *de novo*, to be counted by the terms of her courses.—The compiler of this work observes that this is where the *Ayeesa* had been subject to the courses before she became hopeless of children, as in this case her despair is done away; and this is approved, because it is evident that *months*, with respect to such a woman, are not the absolute substitutes of *Edit*: but if an *Ayeesa* be one to whom the menstrual discharge had never occurred before, and be in her *Edit*, counting it by months, and see the appearance of the sanguinary discharge, regard to the term of the *Edit* which has been counted by months does not drop, because the counting by months is the original rule with respect to such a woman, and not merely the substitute for her courses.

If a woman be in her *Edit*, counting it by the term of her courses,

* Literally a *despairer*, that is, a woman whose courses are stopped, and who is consequently supposed to be past child-bearing.

and

and after two of those they should stop, and she become an *Ayeesa*, her *Edit* commences *de novo*, to be counted by months, and all regard to the courses drops, so as that the *substitute* (which is *months*,) and the *original* (which is *the courses*,) may not be confounded.

THE *Edit* of a woman wedded by an invalid marriage is counted by her courses, both in case of her husband's death, and also, of a separation taking place between them; and so likewise that of a woman with whom a man has had carnal connexion erroneously; because, in those cases, the *Edit* is incumbent merely for the purpose of ascertaining whether the woman be pregnant, and not as a *right of marriage*; and as the courses are the means of ascertaining the state of the womb, the *Edit* of those women is to be counted by their returns.

Rule of *Edit*
in an invalid
marriage.

IF the master of an *Am-Walid* should die, or emancipate her, her *Edit* is three terms of her courses.—*Shafei* says that her *Edit* is only one term, as it is incumbent upon her on account only of the extinction of the owner's propriety, and consequently no more is requisite to effect it than what may suffice to cleanse her womb.—The argument of our doctors is, that *Edit* is incumbent upon her, on account of the extinction of *Firâsh**, (for she is the partner of her master's bed,) and is therefore the same as that used in the dissolution of marriage:—moreover, *Omar* has said “*the EDIT of an AM-WALID is three terms of her courses.*”—If the *Am-Walid* be not subject to the menstrual discharge, her *Edit* is three months, the same as that of a married woman.

Edit of an
Am-Walid.

IF an infant die, leaving a wife pregnant, her *Edit* is accomplished by her delivery, according to *Haneefa* and *Mohammed*. *Abou Yoosaf*

Edit of the
widow of an
infant.

* *Firâsh* literally means *a bed*, whence it is metaphorically used to express a right of cohabitation or concubinage: it is also used in the sense of a *wife* or a *concubine*, whence it is here and elsewhere translated *partner of his bed*.

says that it is four months and ten days, (and such also is the opinion of *Shafeï*,) because the pregnancy cannot be attributed to the *infant*, and is, therefore, with respect to *him*, the same as if it had taken place posterior to his decease.—The arguments of *Haneefa* and *Mohammed* herein are twofold; FIRST, the word of GOD, who has said in the *Koran*, “A WOMAN, IF SHE BE PREGNANT, MUST WAIT UNTIL “HER DELIVERY,”—which is *generally* expressed, and therefore applies to the woman here treated of: SECONDLY, the *Edit* of a woman whose husband dies is (in case of her pregnancy) fixed at the remaining term of her travail, whether that be short or long; now the *Edit* of a *widow* is not designed for the purpose of ascertaining the state of her womb; for if it were so, it would not be determined by the lapse of time, (supposing her to be one who is subject to the menstrual discharge,) but by three terms of her courses; whereas we see that the law fixes it at four months and ten days, although she be a woman of that description; but it is made incumbent merely as a fulfilment of one of the rights of marriage: and the same reasoning applies to the wife of the infant in question, although her pregnancy be not attributed to him: contrary to where pregnancy takes place, subsequent to the infant’s decease; for here her *Edit* of four months and ten days having commenced, is not afterwards to be altered by her subsequent pregnancy; but in the case now under consideration, the *Edit* of the term of travail was due from the infant that *Edit* became incumbent; hence there is an evident difference between the two cases; and consequently there is no analogy between them.—The pregnancy is determined to have taken place after the death of the husband, where the woman is not delivered within less than six months from the date of the husband’s decease.—This is the approved rule. Some have said that it is so judged only where she is delivered within not less than two years. But if a husband, being adult, should die, and his wife be delivered of a child at any time between six months and two years from the period of his decease, her *Edit* is accomplished by her delivery, because the pregnancy is in this case attributed to the husband, and
hence

hence is accounted the same as if it had existed at the period of his decease.—Observe that the parentage of a child born of the wife of an *infant* cannot be established in the infant, whether her pregnancy had appeared during his life, or not until after his decease, because an infant, not being possessed of seed, cannot be conceived capable of impregnating a woman; and marriage is not held to be a substitute for seed*, excepting where the existence of seed on the part of the man may be supposed.

If a man divorce his wife whilst in her courses, that term is not to be counted in her *Edit*, because the *Edit* is fixed at *three complete menstruations*, and if the above were to be counted, it would induce a deficiency, as part of that had passed previous to divorce, and therefore cannot be included.

Edit of divorce of a menstruous woman.

If a man have *erroneous* carnal connexion with a woman who is in her *Edit* from divorce, another *Edit* becomes incumbent upon her, and the two are blended together,—that is to say, her ensuing courses are accounted in both *Edits*; and if the former *Edit* should be accomplished before the latter, the accomplishment of that still remains incumbent upon her. This is the opinion of our doctors.—*Shafēi* maintains that two *Edits* cannot be blended together, because the *Edit* is an act of piety, (as it restrains from taking another husband, and so forth,) and *two* acts of piety are not permitted to be united in *one account*; as in *fasting* for instance, where no part of the abstinence of one day can be put to the account of another.—The argument of our doctors is that the design of the *Edit* is to ascertain the state of the womb, and as that is answered by a single *Edit*, the two *Edits* may be counted together; and piety is not the *design* of the *Edit*, but rather a *dependant* on it; whence it is that the *Edit* may be accomplished, even *without* the knowledge of the woman, merely by her refraining

Edit of a divorced woman who has connexion with a man during the term of her *Edit* of divorce.

* That is, cannot be held to amount to a virtual establishment of *parentage*.

from

from going abroad, or from marrying another husband, or from consummating her marriage with him during the term of it.

Edit of a widow who admits a man during her *Edit* of widowhood.

If a man have carnal connexion with a woman who is in her *Edit* from the death of her husband, she is to complete that of four months and ten days, being the *Edit* of widowhood; at the same time counting such terms of her courses as may occur within the remainder of that time, so as that the two *Edits* may be counted together as far as is possible.

The *Edit* of a widow, or a divorced wife, may be accomplished without her knowledge.

THE *Edit* of divorce commences immediately upon divorce, and that of widowhood upon the decease of the husband; if, therefore, a woman be not informed of her *widowhood* or *divorce* until such time as the term of *Edit* be passed, her *Edit* is then accomplished, because the occasion of *Edit* being incumbent is widowhood or divorce, and it is therefore held to commence upon the occurrence of the *occasion*.—Our modern doctors have decreed that the *Edit* of divorce should not be held to commence until the divorce be publicly declared, in order to guard against collusion between the parties; as it is possible that a husband and wife might privately agree to declare a divorce, and pretend that the *Edit* had already past, so as that, by this means, the marriage being dissolved, he might be enabled to acknowledge a debt in her favour, or to make her a bequest of more than her proper inheritance.

Edit from an invalid marriage.

IN an invalid marriage the *Edit* commences immediately upon the *Kâzees* decree of separation, or upon the determination of the husband, expressly signified, to refrain from carnal connexion.—*Ziffer* says it commences from the date of the last carnal connexion of the parties, because, in an invalid marriage, it is the *carnal connexion* which gives occasion for it, and not the *marriage*.—The arguments of our doctors are twofold;—FIRST, every instance of carnal connexion occurring in an invalid marriage stands only as *one single act*, as they all proceed from,

from, and originate in, *one contract*; (whence it is that one dower suffices for the whole;) wherefore, until the actual separation, or determination signified, as above, *Edit* cannot be established, for in every previous instance of carnal connexion it is possible that the same may be repeated; and hence, so long as the separation or determination do not exist, no particular instance of the carnal act can be positively termed *the last*;—SECONDLY, the last instance of carnal connexion cannot be ascertained to be *the last*, but by the husband's signified determination to refrain for the future, since permission on the part of the woman, and ability on that of the man, in a matter of so concealed and doubtful a nature as carnal connexion, stand as a continuance of it, and any other man who may be desirous to marry the woman will require to know the effect of the *Edit*; it is therefore requisite that something known and visible be substituted for that which is concealed, so as that such visible circumstance may afford a standard whereby to determine.

IF a woman under *Edit* should declare that it is accomplished, and her husband deny this, her declaration upon oath is to be credited, because she is confided in in this point, and he has thrown an imputation upon her veracity: she is therefore to swear in the manner of a plaintiff.

A woman's oath confirms the accomplishment of her *Edit*.

WHEN a man, having repudiated his wife by an irreversible divorce, marries her again during her *Edit*, and afterwards divorces her before consummation, a complete dower is in this case incumbent upon him, and upon the woman an *Edit de novo*, according to *Haneefa* and *Aboo Yoosaf*.—*Mohammed* says that no more is incumbent upon the man than an half dower, nor upon the woman than the accomplishment of her first *Edit*, because the second divorce is a divorce before consummation, and therefore does not require either that he should pay a complete dower, or that he should observe a new *Edit*; nor does any thing remain with respect to her, but that she complete the first *Edit*

Case of a woman remarried after divorce, and again repudiated.

Edit incumbent in consequence of the first divorce; for the obligation upon the woman to complete her first *Edit* disappeared upon the husband marrying her again; but this last marriage being done away by his divorcing her a second time, her obligation to the completion of her first *Edit* recurs. The argument of *Haneefa* and *Aboo Yoosaf* is that the second divorce is, in fact, given after carnal connexion, since the woman is still actually within the seizure of the man in consequence of such connexion formerly had with her, the effect of which remains, namely, the *Edit*; and where he marries her again during her *Edit*, she being still within his seizure, such possession is the substitute of that which appertains to him in virtue of the second marriage; as in the case of an usurper, who if he make purchase of the article usurped whilst it is within his seizure, is held to be seized of the purchase on the instant of the execution of the contract of sale; it is therefore evident that the second divorce is a divorce after carnal connexion.—*Ziffer* says that no *Edit* whatever is incumbent upon the woman, because the former *Edit* dropt in consequence of the second marriage, and therefore cannot recur; and no *Edit* is due on account of the second divorce, as that is a divorce before consummation: but the arguments of the two *Elders*, as above recited, are a sufficient reply to this.

If a *Zimmee*, or infidel subject, repudiate his wife who is also an infidel subject, no *Edit* is incumbent upon her: and the same rule applies to an alien woman who having been converted to the faith, comes from the foreign into the *Mussulman* territory*: it is therefore lawful for such women to marry before the expiration of the term of *Edit*, unless they be *pregnant*. This is the opinion of *Haneefa* with respect to such infidel subjects as do not hold or believe in the obligation of *Edit*. The two disciples say that *Edit* is incumbent upon

* This supposes a woman who, having been converted to the faith in a foreign land, deserts her infidel husband there, and comes into the *Mussulman* territory.

women of either description;—upon infidel subjects, because they have bound themselves to the observance of all such things as appertain to the temporal law; and upon aliens who, having embraced the faith, come into the *Mussulman* territory, because it is so upon such women on other accounts, such as the death of their husbands, or their admitting the son of the husband to carnal connexion, and is therefore equally obligatory on account of separation of country:—contrary to the case where a *man*, being converted to the faith, comes from a foreign into a *Mussulman* territory, and his wife remains in the foreign country, for upon her no *Edit* is incumbent, as the obligation of it cannot reach or affect her in a foreign land.—The argument of *Haneefa* with respect to infidel subjects is that they not being under any obligation in respect to the ordinances of the law, the obligation of *Edit*, as a right of the law, cannot be conceived to effect them; nor can it be supposed to do so on account of the right of the husband, as he does not hold or believe in the obligation of it: and his arguments with respect to alien women are twofold; FIRST, God has commanded *Mussulmans*, saying, “YE MAY MARRY FOREIGN WOMEN, WHO
“ BEING CONVERTED TO THE FAITH, COME INTO THE TERRITORY
“ OF THE BELIEVERS;” SECONDLY, wherever the *Edit* is incumbent, the right of man is connected with it; but a *Hirbee* or *alien* is not considered as *man*, but as *mere matter*, (whence it is that he is made a *property* or *slave*.)—But where the woman is pregnant the *Edit* is incumbent, on account that the *fœtus* of which she is pregnant is of established descent.—It is recorded from *Haneefa* that it is lawful to marry such women, being pregnant, but that the husband must refrain from carnal connexion until after delivery, in like manner as in the case of women pregnant and by whoredom.—The former however is the better opinion.

S E C T I O N.

Of HIDÂD, or MOURNING.

Definition.

By *Hidâd* is understood a woman abstaining from the use of perfumes, such as scented or other oils; or of ornaments, such as dying the edge of the eyelids with antimony, and so forth, except on account of some particular pretext, or (as is said in the *ſama Sagheer*) on account of aches or pains which those applications may remedy.

Mourning is incumbent on the death of a husband,

although he die during the wife's *Edit* from irreverſible divorce.

HIDÂD, or *mourning*, is incumbent upon a woman whose husband dies where ſhe is of mature age and a *Muſſlima*, becauſe the prophet has ſaid “ *It is not lawful for a woman who believes in GOD, and a future ſtate, to obſerve HIDÂD for more than three days on account of the death of any one except her HUSBAND; but for him it is incumbent upon her to obſerve HIDÂD for the ſpace of four months and ten days.*” Our doctors ſay that it is equally incumbent upon a woman whose husband dies whiſt ſhe is under repudiation by irreverſible divorce.—*Shafeï* aſſerts that it is not incumbent upon her, becauſe the ſole intention of its inſtitution is to ſignify grief for the deceaſe of a husband who has faithfully adhered to the marriage contract until death; but there is no cauſe of grief for the demise of one who had, during life, thrown his wife into difficulty and perplexity by divorce. The arguments of our doctors, in ſupport of their opinion upon this point, are twofold; FIRST, the prophet forbade women

women under *Edit* dying their hands with *Hinna**, as it is a species of perfume; SECONDLY, mourning is incumbent as a sign of grief for the loss of the blessings of matrimony, which is not only the means of her support, but also of the preservation of her chastity; and an irreversible divorce is a more complete termination of those blessings than even death itself, since it is lawful for a woman to perform the last offices of ablution, and so forth, to the corpse of a deceased husband from whom she is not irreversibly divorced, whereas it is not lawful for her to perform those offices to the corpse of one from whom she is completely divorced; wherefore in this case also a mourning is incumbent.—It may here be observed that mourning is incumbent for two reasons; FIRST, as it is a manifestation of grief, (as was mentioned above;) SECONDLY, because ornamenting or setting off the person by the use of the above articles is a means of exciting the desires of men, and to a woman under *Edit* marriage is forbidden, wherefore she must refrain from the use of such things, lest she fall into that which is prohibited.—It is recorded, in the *Nakl Saheeb*, that the prophet would not permit women under *Edit* to use antimony upon their eyelids, or to anoint themselves, as the former is an ornament, and the latter is one way of using perfume.—By what is said in the definition of *Hidád*, in the beginning of this section, *viz.* “abstaining “from perfumes, and so forth, except on account of some particular “pretext,” is to be understood, that the use of those is lawful, where there is any *sufficient reason* for it, as they are then used of necessity; but it is requisite that the intention [of the *mourner*] in the use of them be *medicine*, and not *ornament*.

IF a woman be accustomed to the use of unctions, in such a manner that there might be an apprehension of her health suffering from the disuse, in this case, provided the cause for apprehension be in her

* A sort of herb, the juice of which dyes the palms of the hands and soles of the feet of a reddish colour. The herb *cyprus*, or *privet*.

conception apparent and evident, it is lawful to continue the use of them, because things of which the occurrence is strongly apprehended by her are considered as actually existing and established; and in the same manner, she may wear warm furred or velvet garments, where there is a necessity; but it is in no wise lawful for her to use *Hinna*, because of the precept of the prophet before recited; nor to wear cloth dyed with saffron, because that gives a perfume.

Mourning not incumbent upon infidel women or infants, (but it is incumbent upon slaves;)

MOURNING is not incumbent upon an *infidel* woman, as she is not bound to the observances required by the law; neither is it incumbent upon infants or girls under age, for the same reason: but it is incumbent upon female slaves, they being bound to the observances of the law in all such points as do not affect the right of their owner, which is the case with mourning: it is to be observed, however, that the mourning, with respect to female slaves, does not include a prohibition from going abroad, since this would be an infringement upon the proprietor's right, which precedes the right of God, as the individual is necessitous, whereas God is not so.

nor upon *Am-Walids*, nor upon widows from invalid marriage.

MOURNING is not incumbent upon an *Am Walid* under *Edit* from the decease of her proprietor; nor upon a woman under *Edit* who has been contracted in an invalid marriage, because, with respect to such women, the blessings of marriage cannot be said to perish so as to afford a reason for the manifestation of grief; moreover, ornaments and the use of perfumes, and so forth, are in their original nature allowable; and where no special reason appears for the prohibition of them, they necessarily continue to be so.

Proposing for a woman during her *Edit* is disapproved.

It is not decent in any person *publicly* or *expressly* to solicit or seek connexion with a woman under *Edit*; but it matters not if this be done in an indirect and ambiguous manner: yet they should not pass any secret promise of marriage to each other, this being forbidden in the *Koran*.—The ambiguous mode of proposal abovementioned is described

scribed by *Ebn Abbas* to be, that the man in the woman's presence may declare his wish to marry, in *general* terms, without any particular application.

It is not lawful for a woman under divorce to go abroad, either in the night or day, whether the divorce be reversible or irreversible, because the word of God in the *Koran* forbids them from appearing abroad: but a widow is at liberty to go forth during the whole day, and for a short season of the night also; yet she must not pass the night any where but in her own apartments. The reason of this indulgence is that as a widow has no provision from her husband's property, it may be necessary that she should go forth to seek for a subsistence, and it may sometimes happen that she is detained abroad a considerable time, perhaps till after nightfall, whence the extension of the liberty to a *part* of the night: but it is otherwise with a woman under divorce, as she is entitled [during *Edit*] to a subsistence from the husband. Yet if a woman were to enter into an engagement of *Khoola* with her husband, making the consideration for *Khoola* to consist of her subsistence during her *Edit*, some say that she is at liberty to go during the day, while others maintain that she has no liberty of going forth whatever, as the loss of alimony during *Edit* is a consequence of her own voluntary act, wherefore the prohibition, which is a right of the law, still continues in force.

Rules for the
behaviour of
women
during *Edit*.

It is incumbent upon a woman under *Edit* that she observe and accomplish the same in the place where she was resident at the period of divorce taking place, or of the husband's decease, whether that be her own accustomed dwelling, or a house where she may be upon a visit, (that of her *parents*, for instance,) because this is so ordered in the *Koran*; and it also appears in the traditionary precepts of the prophet that he said to a woman whose husband was slain "*stay in your own house until your EDIT be accomplished.*"

IF

A widow may remove from her husband's house, if inconveniently situated there.

IF the apartment allotted to a widow, in the house of her deceased husband, be not sufficiently spacious for her accommodation, and it should happen that the heirs of the defunct exclude her from the other parts of the house, it is then lawful for her to remove elsewhere, because she has here an excuse, and any good pretext suffices in all matters appertaining to the spiritual law, of which description is *Edit*; the case is therefore the same here as where the woman has reason to fear thieves in her own house, or where there is an apprehension of its falling, or where she holds it by hire, and is unable to pay the rent; all which circumstances are a sufficient cause of removal, as well as in the present case.

A wife under irreverfible divorce must be accommodated with a separate apartment.

WHERE a husband and wife are separated by irreverfible or triplicate divorce, it is requisite that there be a curtain or partition between them; and there is no objection to their continuing to reside in the same house, provided this be attended to, as the husband has himself declared her to be prohibited to him: but if he be a *dissolute* person, one who has no command of his passions, and of whom it may be apprehended that he will commit with her that which is unlawful, it is in this case expedient that she remove to another house, (since there is evidently a sufficient excuse,) and that she continue there until the accomplishment of her *Edit*;—it is better, however, that the dissolute husband leave her in his house, and remove to another himself.—It is laudable in the parties, whether the husband be dissolute or otherwise, to engage a female friend to reside in the house with them, who may be able to prevent any improper connexion.—If the dwelling-house be so small as not to admit of their residing in it under these precautions, it is then necessary that the wife remove elsewhere; but it is better that the husband remove, and leave her to reside in the house. All this proceeds upon a supposition of the husband's having no more than *one* house.

IF

IF a woman accompany her husband upon a journey, or on a pilgrimage to *Mecca*, and he give her three divorces upon the way, or die, leaving her in an uninhabited place, she must return to her own city, provided the distance be within three days journey, because this is not to be considered as *going abroad*, but rather as a consequence of her having *before* gone abroad; but if the distance exceed three days journey, she is then at liberty either to return home, or to proceed upon the pilgrimage, whether her guardian be with her or not.—The compiler of this work observes that this is only where she is left within three days journey from *Mecca*, where her stay would be more dangerous than her proceeding; but her return to her own city is preferable, in order that she may there accomplish her *Edit* in the house of her husband.—But if, in the case under consideration, the divorce or death occur in a *city*, or other inhabited place, the woman must not go forth from that place until her *Edit* be accomplished, after which she may leave it, provided she be accompanied by any male relation within the prohibited degrees.—What is here advanced is the doctrine of *Haneefa*.—The two disciples say that, if the woman be accompanied by a relation within the prohibited degrees, she may leave the place before her *Edit* be past; for they argue that she ought to be allowed liberty to return home, in order that she may relieve herself from the disagreeable circumstances attending her residence in a strange place, and also from the derangement and trouble of a journey, because these are sufficient pretexts, and the impropriety of her travelling is removed by the circumstance of her relation accompanying her.—To this *Haneefa* replies that *Edit* affords a stronger reason against removal than even the want of a relation's protection, as a woman may lawfully go to any distance within a day's journey, without being accompanied by a relation, whereas this is not lawful for a woman under *Edit*: and where it is unlawful for a woman to go to any greater distance, unaccompanied by a relation, it is so for one under *Edit*, *a fortiori*.

Rule respecting a wife divorced upon a journey.

C H A P. XIII.

Of the *Establishment of Parentage.*

A child born after six months from the date of a marriage upon which is suspended a conditional divorce, is the lawful offspring of such marriage.

IF a man make a declaration, saying “ if I marry such a woman she “ is divorced,” and he afterwards marry her, and she produce a child after six months from the day of the marriage *, the parentage of the child is established in him, and the dower is incumbent upon him; the former is established, because the wife is in this case considered as a *partner of his bed* at the period of conception, as having brought forth a child at the expiration of six complete months from the date of the marriage, a time considerably posterior to the divorce, since that takes place immediately after the marriage, wherefore the conception must be considered as having taken place prior to the divorce, that is, *within* the marriage.

OBJECTION.—It is not to be imagined that conception should take place *at the time* of marriage, as it is a consequence of the carnal act, which happens *posterior* to it; how, therefore, can it be established that the conception took place before divorce, since the latter occurs upon the instant of the marriage?

REPLY.—Conception may be imagined upon the instant of the marriage, as it is possible that the man may marry the woman whilst in the commission of the carnal act, and consequently, that marriage

* This means any time between *six months* and *two years* from the date of the marriage, as the former of these is held to be the *shortest*, and the latter the *longest* possible term of pregnancy.

and conception may have taken place at the same instant: and as genealogy is a matter the establishment of which is of great moment, this supposition has therefore been adopted: and the dower is incumbent, because the descent of the child being established in him, he is *virtually* held to have cohabited with his wife; and it is due on account of consummation.

IF a man repudiate his wife by a divorce reverfible, and ſhe bring forth a child at the end of two years, or more, from the time of the divorce, the parentage of the child is eſtabliſhed in him, and the divorce is reverſed, provided ſhe had not before declared the accompliſhment of her *Edit*, becauſe it is poſſible that her pregnancy may have taken place during *Edit*, as the *Tobar* (or term of purity) of *ſome* women is much longer than that of *others*, which circumſtance may have protracted its continuance: but if ſhe be delivered of a child within *leſs* than two years from the time of divorce, ſhe becomes completely ſeparated from her huſband, on account of the completion of her *Edit* by delivery: and in this caſe alſo the parentage of the child is eſtabliſhed in the huſband, becauſe it is as poſſible that the conception may have taken place *previous* to divorce, (that is, within the marriage,) as it is that it may have taken place *after* divorce, (that is, within the *Edit* :) but yet *reverſal* is not eſtabliſhed, becauſe, as it is poſſible that conception took place *after* divorce, ſo it is alſo poſſible that it took place *before* divorce; wherefore reverſal cannot be eſtabliſhed, on account of the doubt which exiſts on this point: but where the woman is not delivered until *after* two years, reverſal is eſtabliſhed, as the conception is poſterior to divorce, and muſt be attributed to the huſband, ſince no charge of adultery has been advanced againſt the wife, wherefore it is evident that he has had connexion with her during *Edit*, a circumſtance by which reverſal is eſtabliſhed.

The parent-
age of a child
born two
years *after*
reverfible
divorce is
eſtabliſhed in
the *divorcer*;

IF a man repudiate his wife either by three divorces, or by an ir-
reverfible divorce, and ſhe be delivered of a child within leſs than two

and ſo alſo,
of a child
born *within*
two years

after tri-
plicate or
irreversible
divorce:

years from the period of the divorce, the parentage is established in him, as it is possible that the pregnancy may have existed at that time; and the right of cohabitation does not positively appear to have been dissolved previous to pregnancy, whence the parentage is established in this manner for the sake of caution.—But if the delivery were not to take place until after the expiration of two years from the period of separation, the parentage of the child is not established, as pregnancy in that case evidently appears to have taken place posterior to divorce, and consequently the child cannot be supposed to be begotten by the man in question, since to him carnal connexion with the woman is unlawful: yet if he claim the child as his own, the parentage is established in him, as he here takes it upon himself, and it may be accounted for by supposing him to have had connexion with the woman, erroneously, during her *Edit*.

and so like-
wise of a
child born of
a wife under
age, within
nine months
after either
irreversible

If a man repudiate, by an irreversible divorce, a wife who is under the age of puberty, but yet such an one as may admit of carnal connexion, and she bring forth a child after the expiration of nine months from the time of divorce, the parentage of the child is not established in him; but if the delivery be within *less* than nine months, it is established.—This is according to *Haneefa* and *Mohammed*.—*Aboo Yoosaf* says that the parentage is established in the man, although the child should not be born within less than two years from the period of divorce, because she was under *Edit*, and it is possible that the pregnancy may have existed at the time of divorce, and she not have declared the accomplishment of her *Edit*, wherefore this *infant* wife is the same as a *full grown woman*.—The argument of *Haneefa* and *Mohammed* is that the *Edit* of the wife is in this case appointed to be counted by months, wherefore it is accomplished at the expiration of three months, by the rule of the law, independant of any declaration on her part;—if, therefore, she be delivered of a child within *less* than six months from the end of that term which completes her *Edit*, the parentage of the child is established; but, if she bring not forth until
after

after that time, the parentage is not established, as it appears to have been begotten at the time when she was not a partner of the husband's bed, for the case treats of a girl irreversibly divorced under puberty, and consequently not subject to the menstrual discharge, and whose *Edit* is therefore completed by the *lapse of time*, namely, three months, wherefore it is not possible that pregnancy should have existed at the time of divorce; and the right of cohabitation appears to have undoubtedly expired before pregnancy, so that the descent cannot be established. And if the wife under these circumstances be repudiated by a *reversible* divorce, the rule is the same (with *Haneefa* and *Mohammed*) as before recited. *Aboo Yoosaf* says that the parentage of the child is established in the husband if it be born within *twenty-seven months* from the time of divorce, as it must be allowed that he may have had connexion with her at the *latter end* of the term of three months, which constitutes her *Edit*, and she be delivered within the longest term of pregnancy admitted by the law, namely *two years*. But if the infant wife declare her pregnancy to have taken place during *Edit*, the rule is then the same as with respect to grown women; that is to say, the parentage of the child is established in the husband, as her puberty is proved by her own affirmation.

or *reversible*
divorce.

IF a widow bring forth a child, the parentage is established in her husband, provided the delivery happen within *two years* from the time of his decease.—*Ziffer* says that if she be not delivered until after six months from the time of the completion of the *Edit* of widowhood, in this case the parentage cannot be established, because her *Edit*, upon the lapse of four months and ten days, is completed by the ordinance of the law, as the *Edit* is, by the law, fixed to that time, and is therefore the same as if she were to declare the accomplishment of her *Edit*, as in the case of the infant before mentioned.—Our doctors, on the other hand, say that the *Edit* of the woman in question is not absolutely fixed at four months and ten days, but has also another mode of completion, namely *delivery*, since marriage with an adult

The parent-
age of a child
born of a
widow
within two
years after
the decease
of her hus-
band is
established
in him:

woman is considered as a cause of pregnancy: contrary to the case of a girl under puberty, because the natural state of such an one is an incapacity to bear children, as an infant is not a subject of impregnation until she attain maturity, and concerning the maturity of the infant there is a doubt.

and so also
of a child
born within
six months
after the wife
declaring her
Edit to have
expired,

whatever be
the occasion
of the *Edit*.

IF a woman under *Edit* declare the same to be accomplished, and be afterwards delivered of a child within less than six months from the time of her declaration, the parentage of the child is established, as it is evident that her declaration was unfounded, and is consequently null: but if she be delivered *after* six months from the time of her declaration, the parentage is not established, because nothing appears in this case to annul her declaration, as it is possible that her pregnancy may have occurred after that.—This reasoning applies to every woman under *Edit*, whatever the occasion may be, whether divorce reversible or irreversible, or the decease of her husband; or of whatever description or nature, whether it be counted by months, or by the returns of the courses.

The birth
must be
proved by
evidence.

WHEN a woman under *Edit* is delivered of a child, the parentage is not established, (according to *Haneefa*,) unless the birth be proved by the evidence of two male witnesses, or of *one* male and *two* female.—This is a rule where there is no apparent pregnancy, or where the same is not acknowledged by the husband: but if the pregnancy be apparent, or the husband have acknowledged it, the parentage is established independent of the testimony of witnesses. The two disciples maintain that, in all cases, the parentage is established upon the testimony of one woman,—because the husband's right of cohabitation still continues during *Edit*, and it is this right which occasions the fixing of the parentage of a child upon the husband, wherefore nothing more is required than that some person prove the birth, and the identity, by testifying “This is the child of which such a woman was delivered,”—and thus much may be sufficiently proved by the testimony of
a single

a single woman, in the same manner as it is during marriage, in a case where the husband disputes the child's identity.—*Haneefa*, on the other hand, argues that the *Edit* is accomplished by the woman's declaration of delivery; but the mere completion of *Edit* is not *proof*, and the descent still remains to be first established, for which reason it is that *complete* proof (that is, the testimony of two men, or of one man and two women,) is made a condition: but it would be otherwise if the pregnancy were apparent, or acknowledged by the husband, as in this case the parentage is established *prior* to the birth; and the child's identity is there ascertained by the testimony of one woman,—the *midwife*, for instance.

If a woman under *Edit* from the death of her husband bring forth a child, and declare it to be his, and the heirs confirm her assertion, though no person bear evidence to the birth, the child is held to be descended of the husband, according to all our doctors *. This, with respect to *inheritance*, is evident, as inheritance is a sole right of the heirs, and consequently their testimony or acknowledgment is to be credited in every matter which affects it.—A question, however, may arise in this case whether the parentage of the child be by such testimony established with respect to others than those heirs: and upon this the learned in the law observe, that if those heirs be persons of a description capable of being admitted as witnesses, the parentage is established with respect to all others as well as themselves, because their testimony amounts to proof, for which reason some doctors require that their confirmation of the woman's assertion be delivered in the form of evidence: but the necessity of this is denied by others, because the establishment of parentage, with respect to the rest of mankind, is a necessary consequence of its establishment with respect to the immediate heirs of the deceased by their confirmation; and where a matter is once fully established upon any particular ground, no necessity exists for any further conditions with respect to its establishment.

The parentage of a child born of a widow, when uncontroverted, is established in her deceased husband, independent of evidence.

* This means, at whatever time the child be born, after the husband's decease.

A child born within less than six months after marriage is not the offspring of that marriage; but if *after* six months, it is so, independent of the husband's acknowledgment; or upon the evidence of one witness to the birth where he *denies* it: and *Laân* is incumbent, if he persist in his denial: and the wife's testimony is to be credited in respect to the *date* of the marriage.

IF a man marry a woman, and she bring forth a child within less than six months after the marriage, the parentage of the child is not established in the husband, as pregnancy in that case appears to have existed previous to the marriage, and consequently cannot be derived from him: but if she be delivered *after* six months, it is established, whether he acknowledge it or not, because then the marriage appears to have existed at the time of impregnation, and the term of pregnancy is complete. If, moreover, the husband *deny* the birth, it may be proved by the evidence of one woman, after which the parentage is established in virtue of the marriage; and such being the case, if he persist in denying the child, imprecation becomes incumbent, because his denial then amounts to an imputation on his wife's chastity, since it implies a charge of adultery against her. And if, upon the birth of a child, a dispute were to arise between the husband and wife, he asserting that he had married her only *four* months before, and she maintaining that they had been married *six* months, the declaration of the wife is to be credited, and the child belongs to the husband, because apparent circumstances testify for the wife, as it appears that her pregnancy has been a consequence of *marriage* and not of *whoredom*.—A question has arisen among our doctors whether the woman's assertion is to be credited *without* being confirmed by oath? The two disciples hold that it requires her oath: but *Haneefa* maintains the contrary opinion.

Divorce suspended upon the birth of a child cannot take place on the evidence of one woman to the birth.

IF a man suspend divorce upon the circumstance of his wife's bearing a child, by saying to her “upon being delivered of this child “you are divorced,”—and a woman afterwards give testimony to her being delivered, yet divorce does not take place, according to *Haneefa*. The two disciples maintain that divorce takes place, because the evidence of a single woman suffices in all such matters as are improper to be beheld by men; and the evidence of one woman to a birth being admitted, it is also to be admitted with respect to whatever proceeds from the birth, which in the present instance is divorce.—The argument

ment of *Haneefa* is that the woman, in this case, stands as a plaintiff for penalty against her husband, and he appears as the defendant, wherefore her claim cannot be established but by complete proof.—The foundation of this is that the evidence of a woman is admitted with respect to child-birth from necessity only, and has therefore no effect with respect to divorce, since that is a matter altogether distinct from childbirth, and unconnected with it, although such connexion appear to exist from the peculiar circumstances of the present case.—But if the husband acknowledge the pregnancy, divorce takes place upon the woman independant of the evidence of others, according to *Haneefa*.—The two disciples hold that in this case also the testimony of the midwife is necessary, because proof is indispensable to the establishment of a *Dawee Hins*, or claim of penalty, and the evidence of the midwife amounts to proof, according to what was before said.—The arguments of *Haneefa* are twofold;—FIRST, the acknowledgment of pregnancy amounts to an acknowledgment of that which pregnancy induces, and extends thereto, and that thing is childbirth; SECONDLY, the husband, in acknowledging the pregnancy, declares his wife a *trustee*, as the child is a deposit in her possession, and consequently her word is to be credited in the surrender of the deposit, as much as that of any other trustee.

THE longest term of pregnancy is two years, because of the declaration of *Aysha*, “*the child does not remain in the mother’s womb beyond two years:*” and the shortest term is six months, because the sacred text says “*THE WHOLE TERM OF PREGNANCY AND WEAN-ING IS THIRTY MONTHS;*” and *Ibn Abbas* has said that the term of suckling is two years, wherefore six months remain for the pregnancy.—*Shafei* has said that the longest term of pregnancy extends to four years; but the text here quoted, and the opinion of *Ibn Abbas* as above, testify against him.—It is probable that *Shafei* may have delivered this opinion upon hearsay, as this is a matter which does not admit of reasoning.

The term of pregnancy is from six months to two years.

IF

Case of a man divorcing a wife who is a slave, and then purchasing her.

IF a man marry a female slave, and afterwards divorce her, and then purchase her, and she be delivered of a child within less than six months from the day of purchase, the parentage is established in him; but if she be delivered after six months, the parentage is not established; because, in the first instance, the child is considered as born of a woman under *Edit*, conception appearing to have taken place before purchase; but, in the second instance, it is regarded as slave-born, as the length of the term of pregnancy here admits of conception being referred to a time subsequent to purchase; and the child thus appearing to be born (not of a *wife*, but) of a *slave*, his acknowledgment is requisite to the establishment of its parentage.—What is now advanced proceeds upon a supposition of the slave being repudiated by a single divorce, reversible or irreversible, or by *Khoola*: but if she be repudiated by *two* divorces, the parentage of the child is established, if it be born within *two years* from the date of the divorce, because in this case she is rendered unlawful to her husband by the rigorous prohibition, whence the pregnancy can be referred only to a time previous to divorce, since, under such a circumstance, she is not rendered lawful to the man by his subsequent purchase of her.

Miscellaneous cases.

IF a man say to his female slave “if there be a child in your “womb it is mine,” upon a woman afterwards bearing testimony to the birth, the slave becomes *Am-Walid* to that man, because here all that is requisite is to prove the child’s identity, by shewing that “such a woman has been delivered of such a child,”—and this is sufficiently ascertained by the testimony of the midwife, according to all our doctors.

If a man say of a boy, “this is my son,” and afterwards die, and the mother come declaring herself to be the wife of the deceased, she must be considered as such, and the boy as his child, and they both inherit of him. It is recorded in the *Nawádir* that this rule proceeds upon a favourable

vourable construction of the law, for analogy requires that the woman should not inherit, since descent is established not only in virtue of a *valid* marriage, but also of an *invalid* marriage, or of erroneous carnal connexion, or of possession by right of property, and therefore the man's declaration that "*this is his son*" does not amount to an acknowledgment of his having married the mother: but the reason for a more favourable construction of the law here, is that the case supposes the woman to be one whose freedom and maternal right in the child are matters of public notoriety, and the validity of a marriage is ascertained by circumstances. But if the woman be not known to be free, and the heirs of the husband maintain that she is only an *Am-Walid*, she is not entitled to any inheritance, because the mere *appearance* of freedom, (supposing this case to occur in a *Mussulman* territory,) although it defend the party from slavery, is not sufficient to establish a claim of inheritance.

C H A P. XIV.

Of *Hizánit*, or the Care of *Infant Children*.

IF a separation take place between a husband and wife, who are possessed of an infant child, the right of nursing and keeping it rests with the mother, because it is recorded that a woman once applied to the prophet, saying "O, prophet of God! this is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and

In case of separation, the care of the infant children belongs to the wife.

“ his father is desirous of taking him away from me into his own care;”—to which the prophet replied, “ *thou hast a right in the child prior to that of thy husband, so long as thou dost not marry with a stranger:*”—moreover, a mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child; and *Siddeek* alluded to this, when he addressed *Omar* on a similar occasion, saying “ *the spittle of the mother is better for thy child than honey, O OMAR!*” which was said at a time when separation had taken place between *Omar* and his wife, the mother of *Affim*, the latter being then an infant at the breast, and *Omar* desirous of taking him from the mother; and these words were spoken in the presence of many of the companions, none of whom contradicted him:—but the *Nifka* or subsistence of the child is incumbent upon the father, as shall be hereafter explained. It is to be observed, however, that if the mother refuse to keep the child, there is no constraint upon her, as a variety of causes may operate to render her incapable of the charge.

Order of precedence in *Hizânit*, after the mother.

IF the mother of an infant die, the right of *Hizânit* (or infant education) rests with the *maternal* grandmother, in preference to the *paternal*, because it originates in and is derived from the mother; but if she be not living, the *paternal* grandmother has then a right prior to any other relation, she being as one of the child's mothers, (whence it is that she is entitled to a sixth of the effects of a child of her son, which is the mother's share *;) and she must moreover be considered as having a more tender interest in her own offspring than any collateral relation. If there be no grandmother living, in this case a sister is preferable to either a maternal or paternal aunt, as she is the daughter of the father and mother, or of one of them, whence it is that she would take place of the aunts in inheritance:—(according to one tradition, the maternal aunt is preferable to a half sister by the father's

* This must mean, in case of the mother's death.

fide,

side, the prophet having said “*the maternal aunt is as a mother.*”)—A full sister also has preference to an half sister, maternal or paternal; and a maternal sister to a paternal sister; because the right of *Hizánit* is derived to them through the mother. The maternal aunt has preference to the paternal, because precedence is given, in this point, to the maternal relation. The same distinction also prevails among the aunts as among the sisters;—that is, she who is doubly related has a preference to her who is singly related; thus the maternal aunt, who is *full* sister to the mother, precedes an *half* sister, maternal or paternal; and in the same manner, a maternal sister precedes a paternal sister; and so also of the paternal aunts. If however any of these women, having the right of *Hizánit*, should marry a stranger, her right is thereby annulled, on account of the tradition before quoted, and also, because where the husband is a stranger, it is to be apprehended that he may treat the child unkindly; where the woman, therefore, who has charge of an infant marries, it is neither advantageous nor adviseable that the infant remain with her, unless the person she marries be a relation,—as where the mother, for instance, having charge, marries the child’s paternal uncle, or the maternal grandmother marries the paternal grandfather,—because these men being as *parents*, it is to be expected that they will behave with tenderness:—and so also of any other relation within the prohibited degrees, for the same reason.

ANY woman whose right of *Hizánit* is annulled by her marrying a stranger recovers the right by the dissolution of the marriage, the objection to her exercise of it being thereby removed.

If there be no woman to whom the right of *Hizánit* appertains, and the *men* of the family dispute it, in this case the nearest paternal relation has the preference, he being the one to whom the authority of guardian belongs: (the degrees of paternal relationship are treated of in their proper place:) but it is to be observed that the child must

In defect of the *maternal*, it rests with the nearest *paternal* relation.

not be entrusted to any relation *beyond* the prohibited degrees, such as the *Mawla* or emancipator of a slave, or the son of the paternal uncle, as in this there may be apprehension of treachery.

Length of the
term of *Hizânit*.

THE right of *Hizânit*, with respect to a male child, appertains to the mother, grandmother, or so forth, until he become independant of it himself, that is to say, become capable of shifting, eating, drinking, and performing the other natural functions without assistance; after which the charge devolves upon the father, or next paternal relation entitled to the office of guardian, because, when thus far advanced, it then becomes necessary to attend to his education in all branches of useful and ornamental science, and to initiate him into a knowledge of men and manners, to effect which the father or paternal relations are best qualified:—(*Kasâf* says that the *Hizânit*, with respect to a boy, ceases at the end of seven years, as in general a child at that age is capable of performing all the necessary offices for himself, without assistance.)—But the right of *Hizânit* with respect to a girl appertains to the mother, grandmother, and so forth, until the first appearance of the menstrual discharge, (that is to say, until she attain the age of puberty,) because a girl has occasion to learn such manners and accomplishments as are proper to *women*, to the teaching of which the female relations are most competent;—but after that period the charge of her properly belongs to the father, because a girl, after maturity, requires some person to superintend her conduct, and to this the *father* is most completely qualified.—It is recorded from *Mohammed* that the care of a female child devolves upon the father as soon as she begins to feel the carnal appetite *, as she then requires a superintendance over her conduct; and it is universally admitted that the right of *Hizânit* of girls is restricted to that period, with respect to all the female relations except the mother and grandmother. It is

* This is supposed by the *Mussulmans* to commence sometime *before* the appearance of the menstrual discharge, at between eleven and twelve years of age.

written in the *Jama Sagbeer*, that the right of *Hizānit*, with any except the mother or grandmother, discontinues upon the girl becoming capable of performing the natural offices without assistance, because no other is entitled to require any service of her, (whence it is that they cannot hire her as a servant to others,) and such being the case the end, (namely, the girls education,) cannot be obtained: but it is otherwise with the mother or grandmother, as they are invested with a legal right to require her services.

If a man contract his female slave, or *Am-Walid*, in marriage to any person, and she bear a child to her husband, and the master afterwards emancipate her, she then becomes (with respect to the *child*,) as a free woman;—that is, upon becoming free she obtains her right of *Hizānit* which had not existed whilst she was a slave, because her service, as a slave, would necessarily interfere with the proper discharge of the duties of *Hizānit*.

A slave has the right upon obtaining her freedom;

A ZIMMEEA, or female infidel subject, married to a *Mussulman*, is entitled to the *Hizānit* of her child, although he be a *Mussulman* like the father; but this only so long as the child is incapable of forming any judgment with respect to *religion*, and whilst there is no apprehension of his imbibing an attachment to infidelity; but when this is the case, he must be taken from the mother, because, although it be for the child's advantage to be under her care until that period, his remaining longer with her might prove injurious.

and also an infidel mother the wife of a *Mussulman*.

A BOY or girl, having passed the period of *Hizānit*, have no option to be with one parent in preference to the other, but must necessarily thenceforth remain in charge of the *father*.—*Shafēi* maintains that they have an option to remain with either parent, because of a tradition of the prophet to this effect. The argument of our doctors is, that young persons from want of judgment will naturally wish to stay with the parent who treats them with most indulgence, and lays them

Children, after the term of *Hizānit*, remain solely under the care of the *father*.

them under least restraint, wherefore giving them a choice in this matter would not be *tenderness*, but rather *the reverse*, as being contrary to their true interest; and it appears in the *Nakl Sabeeh* that the companions withheld this option from children.—With respect to the tradition cited by *Shafei*, it may be observed that, in the instance there alluded to, where the prophet gave a boy his choice, he first prayed to God to direct him therein, and the boy then chose, under the influence of the prophet's prayer.

S E C T I O N.

A mother
cannot re-
move with
her child to a
strange place.

IF a divorced woman be desirous of removing with her child out of a city, she is not at liberty to do it;—but yet if she remove with her child out of a city, and go to her native place, where the contract of her marriage was executed, in this case her removal is lawful, because the father is considered as having also undertaken to reside in that place, both in the eye of the law, and according to common usage, for the prophet has said “ *Whoever marries a woman of any city is* “ *thereby rendered a DENIZEN of that city;*” and hence it is, that if an alien woman were to come into the *Mussulman* territory, and there to marry an infidel subject, she also becomes an infidel subject: it is to be observed, however, that this rule does not apply to an alien man,—that is to say, if an alien man were to come into the *Mussulman* territory, and there to marry a female subject, he is not thereby rendered a subject; for, if he chuse, he may divorce this wife and return to his own country.

IF a divorced woman be desirous of removing with her child to a place which is not the place of her nativity, but in which her marriage contract was executed, she is not at liberty to do it. This is
8
demonstrated

demonstrated by *Kadooree* in his compendium, and also accords with what is related in the *Mabsoot*. The *Jama Sagheer* says that she may take her child thither, because where a marriage contract is executed in any place, it occasions all the ordinances thereof to exist and have force in that place, in the same manner as sale amounts to a delivery of the article sold in the place of sale; and a woman's right to the care of her children is one of the ordinances of marriage, wherefore she is entitled to keep her child in the place where she was married, although she be not a native of that place. The principle upon which the *Mabsoot* proceeds in this case is, that the execution of a contract of marriage in a place merely of *casual* residence, (such as the stage of a journey,) does not constitute it *a home*, according to general usage, and this is the better opinion. In short, to the propriety of the woman carrying her child from one place to another, two points are essentially requisite,—*one*, that she be a *native* of the place to which she goes; and the *other*, that her marriage contract has been there executed; this, however, means only where the places are *considerably distant*; but if they be so *near* that the father may go to see his child and return the same night, there is no objection to the wife going to the other place with the child, and there remaining; and this, whatever be the size or degree of the places, whether *cities* or *villages*; nor is there any objection to her removing from the *village* to the *city* or *chief town* of a district, as this is in no respect injurious to the father, and is advantageous to the child, since he will thereby become known and acquainted with the people of the place: but the reverse [that is, her removal from the *city* to a *village*,] would be injurious to the child, as he would thereby be liable to acquire the low manners and mean sentiments of villagers; wherefore a woman is not at liberty to carry her child from a *city* to a *village*.

C H A P. XV.

Of *Nifka*, or *Maintenance*.

Definition of
the term.

NIFKA, in the language of the law, signifies all those things which are necessary to the support of life, such as *food*, *clothes*, and *lodging*: many confine it solely to *food*.

S E C T. I.

Of the *NIFKA* of the *WIFE*.

The sub-
sistence of a
wife is in-
cumbent
upon her
husband,

WHEN a woman surrenders herself into the custody of her husband, it is incumbent upon him thenceforth to supply her with food, clothing, and lodging, whether she be a *Mussulman* or an *infidel*, because such is the precept both in the *Koran* and in the traditions; and also, because maintenance is a recompence for the matrimonial restraint; whence it is that where a person is in custody of another on account of any demand, or so forth, his subsistence is incumbent upon that other,—as when a public magistrate, for instance, is imprisoned on account of any mal-administration in his office, in which case his subsistence must be provided from the public treasury; and as the authorities upon which this proceeds make no distinctions between a *Mussulman* and an *infidel*, the rule holds the same with respect to either in the present case.

IN

IN adjusting the obligation of the *Nifka*, or maintenance of a wife, regard is to be had to the rank and condition both of her and her husband: thus if the parties be both wealthy, he must support her in an opulent manner; if they be both poor, he is required only to provide for her accordingly; and if he be rich and she poor, he is to afford her a moderate subsistence, such as is below the former and above the latter.—The compiler of this work says that this is the opinion adopted by *Khafaf*; and that decrees pass accordingly. *Koorokhee* is of opinion that the rank and condition of the husband alone is to be regarded, (and such also is the doctrine of *Shafei*;) because the sacred text says “LET HIM SUPPORT HER ACCORDING TO HIS ABILITY.—The ground of *Khafaf*’s opinion is a tradition respecting the prophet, who, on a woman applying to him for his judgment upon this point, said to her “*take from the property of your husband whatever may suffice for the subsistence of yourself and your child in the customary way;*” from which it appears that the circumstances of the woman are to be regarded as well as those of the man, for maintenance is incumbent only so far as may suffice for the purpose intended by it, and as a woman in mean circumstances has no occasion for the same subsistence as one who is accustomed to live in affluence, such is (with respect to her) unnecessary; and as to the text above quoted by *Shafei*, it means no more than that if the woman be in affluent circumstances, and her husband otherwise, he shall support her according to his ability, and the remainder, or difference, shall be a debt upon him. By the expression “*customary way,*” in the tradition quoted by *Shafei*, is to be understood a *middling* or *moderate* way, that is, a medium between the circumstances of the wife, and those of the husband, where the former happens to be rich and the latter poor; and as the prophet in his decision left this to the judgment of the parties themselves, the proportion is not specifically determined by the law.—*Shafei* has so determined it, saying that the *Nifka* or maintenance incumbent upon a husband in behalf of his wife, if he be opulent, is two *Mids*, or about

in proportion
to the rank
and circum-
stances of the
parties;

one thousand *Dirms* * annually,—if he be poor, one *Mid*; and if in middling circumstances, one and a half: this, however, is not admitted, because a thing declared to be incumbent “*so far as may suffice*” cannot be legally fixed at any specific rate, as the proportion must necessarily vary according to circumstances.

and this, although she withhold herself on account of her dower:

IF a woman refuse to surrender herself to her husband, on account of her dower, (that is, on account of its not having been paid to her,) her maintenance does not drop, but is incumbent upon the husband, although she be not yet within his custody, since her refusal is only in pursuance of her right, and consequently the objection to the matrimonial custody originates with the husband.

but not if she be refractory,

IF a wife be disobedient or refractory, and go abroad without her husband's consent, she is not entitled to any support from him, until she return and make submission, because the rejection of the matrimonial restraint in this instance originates with her: but when she returns home, she is then subject to it, for which reason she again becomes entitled to her support as before. It is otherwise where a woman, residing in the house of her husband, refuses to admit him to the conjugal embrace, as she is entitled to maintenance, notwithstanding her opposition, because, being then in his power, he may, if he please, enjoy her *by force*.

or an infant incapable of generation:

IF a man's wife be so young as to be incapable of generation, her maintenance is not incumbent upon him, because although she should be within his custody, yet as an obstacle exists in her to the carnal embrace, this is not the custody which entitles to maintenance, that being described “*custody, for the purpose of enjoyment*,” which

* *Dirms* have varied in their value at different times, from twenty to twenty-five passing current for a *Deenar*. The sum here mentioned is from about eighteen to twenty-two pounds sterling.

does not apply to the case of one incapable of the act:—contrary to the case of a *sick* woman, to whom maintenance is due, although she be incapable, as shall be hereafter demonstrated.—*Shafei* says that maintenance is due to an infant wife, because he holds it to be a return for the matrimonial propriety, in the same manner as it is with respect to a slave for the propriety in his personal service. To this, however, our doctors reply that the dower is the return for the matrimonial propriety, and *one* thing does not legally admit of *two* returns; wherefore, in the case of an infant wife, the *dower* is due, but not *maintenance*.

BUT if the husband be an infant incapable of generation, and the wife an adult, she is entitled to her maintenance at his expence, because in this case *delivery of the person* has been performed on *her* part, and the obstacle to the matrimonial enjoyment exists on the part of the *husband*.

but it is due to an *adult* wife from an *infant* husband.

IF a woman be imprisoned for debt, her husband is not required to support her, because the objection to the matrimonial custody does not in this case originate with him, whether her imprisonment be owing to herself (as in a case of wilful delay and contumacy) or otherwise, (as where she is poor and unable to discharge the debt.) And, in the same manner, if a woman be forcibly seized and carried off by any person, she has no claim to maintenance from her husband; and so also, if a woman go upon a pilgrimage, under charge of a relation within the prohibited degrees,—because she is not then in custody of her husband, and her not being so is occasioned by her own voluntary act. It is recorded from *Abou Yoosaf* that a woman upon a pilgrimage is entitled to a maintenance from her husband, as her undertaking the *indispensable pilgrimage* * is a sufficient pretext for her leaving him;

It is not due where the wife is imprisoned for debt,

or forcibly carried off,

or goes upon a pilgrimage,

* Arab. *Hidj-Farz*.—It is incumbent upon all *Moslamites* to perform at least one pilgrimage to *Mecca*, and this one is reckoned among the *Firáyez*, or sacred ordinances, whence the above epithet.

(unless she be accompanied by the husband.)

but he allows her only a *Nifka-Hizr*, or support as in a settled place; and not a *Nifka-Sifr*, or support as upon a journey; as the *former* only is incumbent upon the husband, not the *latter*. But if the husband accompany his wife upon her pilgrimage, her maintenance is then incumbent upon him according to all our doctors, because in this case she continues in his custody; but she is entitled to a *Nifka-Hizr* only, not to a *Nifka-Sifr*, as he is not the occasion of her travelling, whence it is that he is not obliged to furnish her with a conveyance.

It continues during her sickness.

IF a woman fall sick in her husband's house, she is still entitled to a maintenance. This is upon a principle of benevolence, as analogy would suggest that she is not entitled to maintenance, where she falls sick so far as to be incapable of admitting her husband to the conjugal embrace, since in this case she cannot be deemed *in custody for the purpose of enjoyment*: but the reason for a more favourable construction of the law in this case is, that she still remains in custody, as her husband may associate and indulge in dalliance with her, and she may continue to superintend his domestic concerns, and the obstacle to carnal enjoyment is (like the menstrual discharge) an accidental occurrence.—It is recorded from *Abou Yoosaf* that if a woman deliver herself into the custody of her husband, and then fall sick, she is still entitled to maintenance; but if she fall sick first, and then deliver herself to him, she has no claim to maintenance until her recovery, as the surrender of her person is not in this case complete: and the learned in the law admit this to be a proper distinction.

A husband must maintain his wife's servants.

THE maintenance of the wife's servants is incumbent upon her husband, as well as that of the wife herself, provided he be in opulent circumstances, because he is obliged to provide his wife's maintenance, "*so far as may suffice*," (as aforesaid,) and it is not sufficient, unless her servants also be supported, they being essential to her ease and comfort: but it is not absolutely incumbent upon him to provide a maintenance for more than *one* servant, according to *Haneefa* and *Mohammed*.

Mohammed. *Abou Yoosaf* says he must provide maintenance for *two* servants, as one is required for service within the house, and the other out of doors.—The arguments of *Haneefa* and *Mohammed* on this point are twofold;—FIRST, one servant may answer both purposes, whence two are unnecessary; SECONDLY, if the husband were himself to undertake all the services required by the wife, it would suffice, and a servant would be unnecessary; and, in the same manner, it suffices if he constitute any single servant his substitute therein; wherefore a second servant is not requisite. The learned in the law say that the rate of maintenance due from an opulent husband to his wife's servants is the same as that due from a poor husband to his wife,—namely, the lowest that can be admitted as sufficient.—*Haneefa* says that a husband who is poor is not required to find maintenance for his wife's servants; and this is an approved doctrine, as it is to be supposed that the wife of a poor man will serve herself. *Mohammed* holds that it is due from a poor husband, in the same manner as from one more opulent.

If a husband become poor, to such a degree as to be unable to provide his wife her maintenance, still they are not to be separated on this account, but the *Kâzee* shall direct the woman to procure necessities for herself upon her husband's credit, the amount remaining a debt upon him.—*Shafî* says that they must be separated, because whenever the husband becomes incapable of providing his wife's maintenance, he cannot “*retain her with humanity*,” (as is required in the sacred writings,) and such being the case, it behoves him to divorce her; and if he decline so to do, the *Kâzee* is then to effect the separation as his substitute, in the same manner as in cases of emasculation or impotence: nay, the necessity for this is more urgent in the present instance than in either of those cases, as the maintenance is indispensable. To this our doctors reply that if a separation take place the right of the husband is destroyed *in toto*, which is a grievous injury to him; whereas, if the wife be desired to procure maintenance for herself upon his credit, his right is by this means preserved with the smallest possible

If the husband be poor, the magistrate must empower the wife to raise subsistence upon his credit,

at a certain
specified rate,

possible injury; wherefore they are not to be separated, but the wife shall be directed to take up the articles necessary for her subsistence upon his credit, as was already stated:—but the wife is in this case restricted in her expences to a rate which must be determined by the *Kázee*.—The *Kázee* cannot act as the substitute of the husband in effecting a separation here, as in cases of emasculation or impotence, because property in marriage is only a dependant, or secondary consideration, the primary object being *procreation*, and that which is a *dependant* merely cannot be put in competition with the original intent, upon which principle it is that the *Kázee* is empowered to effect a separation in either of the other two instances, as there the original intent is defeated; but it is not so in the present case. The advantage of the *Kázee* desiring the woman to procure a maintenance upon her husband's credit, and of his fixing the rate thereof, is that she is thereby enabled to make her husband responsible for the amount; for if she contract any debt without this authority, the creditor's claim lies against *her*, and not against her *husband*.

to be varied
according to
any change in
his circum-
stances.

If the husband were in indigent circumstances at the time of the *Kázee* authorizing the wife as aforesaid, and he have consequently determined her maintenance at the rate of *poverty*, and the husband afterwards become rich, and she sue for a proportionable addition to her maintenance, a decree must be given in her favour, as the rate of the maintenance differs according to the poverty or opulence of the husband.

Arrears of
maintenance
not due, un-
less the main-
tenance have
been decreed
by the *Kázee*,
or the rate of
it previously
determined
on between
the parties.

If a length of time should elapse during which the wife has not received any maintenance from her husband, she is not entitled to demand any for that time, except when the *Kázee* had before determined and decreed it to her, or where she had entered into a composition with the husband respecting it, in either of which cases she is to be decreed her maintenance for the time past, because maintenance is an obligation

obligation in the manner of a *gratuity**, as by a gratuity is understood a thing due without a return, and maintenance is of this description, it not being held (according to our doctors) to be as a return for the matrimonial propriety; and the obligation of it is not valid but through a decree of the *Kázee*, like a gift, which does not convey a right to possession but through seizin, which establishes possession: but a composition is of equal effect with a decree of the *Kázee*, in the present case, as the husband, by such composition, makes himself responsible, and his power over his own person is superior to that of the magistrate.—This reasoning does not apply to the case of *dower*, as that is considered to be a return for the use of the wife's person.

If the *Kázee* decree a wife her maintenance, and a length of time elapse without her receiving any, and the husband should die, her maintenance drops; and the rule is the same if *she* should die; because maintenance is a gratuity, respecting which the rule is that it drops in consequence of death, like a gift, which is annulled by the decease of either the donor or donee before seizin being made by the latter.—*Shafei* says that the maintenance is in all circumstances to be considered as a debt upon the husband, in conformity with his tenet, that it is not a *gratuity* but a *return*, wherefore it cannot drop like demands of the former description.—This was before replied to.

Arrears of a decreed maintenance drop in case of the death of either party.

If a man give his wife one year's maintenance in advance, and then die before the expiration of the year, no claim lies against the woman for restitution of any part of it.—This is the doctrine of *Haneefa* and *Aboo Yoosaf*.—*Mohammed* says that she is entitled only to the proportion due for the term past, from the beginning of the year till the husband's decease, the remainder being the right of his heirs; if,

Advances of maintenance cannot be reclaimed.

* Arab. *Sillit*. By this is to be here understood a present or gratuity promised but not yet paid.

therefore,

therefore, the difference remain with her *in substance*, she must restore it; or, if it do not remain, she is responsible for the value, (and this also is the doctrine of *Shafëi*, and the same difference of opinion obtains in respect to clothes and apparel,) because the wife in this case has received *in advance* the return for the matrimonial confinement, to which she has a claim, in virtue of such confinement, but her claim is annulled by the husband's decease, since she no longer remains confined, and consequently the return is annulled in proportion to the annulment of her claim, in the same manner as the stipend of a *Kâzee*.—The argument of the two *Elders* is that the maintenance is a gratuity, of which the claimant has already taken possession; and restitution of a gratuity cannot be demanded after death, the virtue of it being completed by that event, as in a case of gift; whence it is that if the maintenance were to *perish* in the woman's possession, without her consuming it, no part of it can be demanded of her, according to all the doctors, whereas, if it were a *return*, it might be demanded in a case of *destruction*, as well as in one of *consumption*, nor would there be any difference between the two.—It is recorded from *Mohammed* that if the proportion advanced do not exceed that of one month, no restitution is required, as this proportion is inconsiderable, and stands as an allowance for present use.

A slave may be sold for the maintenance of his wife, if the latter be free.

If a slave marry a free woman, her maintenance is a debt upon him, for the discharge of which he may be sold; but this is only provided the marriage was with his owner's consent, as her maintenance being due from the slave, the obligation to it must ultimately affect his owner; the debt is therefore charged to the slave, in the same manner as one contracted in trade by a *Mazoon*, or privileged slave; but his owner is at liberty to redeem him by discharging the debt, because the woman's right extends to her maintenance only, not to the slave's person: and if the slave die, her right to any arrear of maintenance drops, (and so also where he is *killed*,) since it is a *gratuity*, as was already stated.

IF a man marry the female slave of another, and her owner give her permission to reside in her husband's house, her maintenance is incumbent upon the husband, because she is then within his custody: but if she have not permission to reside with her husband, he is not responsible for her maintenance, as in this case her custody is not established.—The term here applied to the permission granted by the master [*taboweeat*] means not only liberty to reside in the husband's habitation, but also an exemption from all service; wherefore, if any service be afterwards required of her, the maintenance from the husband drops, as custody, which is the ground of her right to maintenance from him, necessarily ceases on such an occasion.—It is lawful for the master to require the service of his female slave, although he have granted her leave to reside with her husband, because such leave is not *binding* upon him, as is demonstrated in its proper place.—But it is to be observed that if the female slave voluntarily perform her master's service, without his calling upon her, her right to maintenance from her husband does not drop. These rules apply equally to *Am-Walids* as to absolute slaves.

A husband must maintain his wife, being a slave, where she resides with him:

and the same of *Am-Walids*.

S E C T. II.

IT is incumbent upon a husband to provide a separate apartment for his wife's habitation, to be solely and exclusively appropriated to her use, so as that none of the husband's family, or others, may enter without her permission and desire, because this is essentially necessary to her, and is therefore her due the same as maintenance, and the word of God appoints her a dwellinghouse as well as a subsistence: and as it is incumbent upon a husband to provide a habitation for his wife, so he is not at liberty to admit any person to a share in it, as this would be injurious to her, by endangering her property, and obstruct-

A wife must be accommodated with a separate apartment,

ing her enjoyment of his society; but if she desire it, the husband may then lawfully admit a partner in the habitation, as she by such a request voluntarily relinquishes her right: neither is the husband at liberty to intrude upon his wife his child by another woman, for the same reason.

If the husband appoint his wife an apartment within his own house, giving her the lock and key, it is sufficient, as the end is by this means fully obtained.

but under the
controul of
her husband,
with respect
to visitors, &c.

A HUSBAND is at liberty to prevent his wife's parents, or other relations, or her children by a former marriage, from coming in * to her, as her apartment or habitation is his property, which he may lawfully prevent any person from entering; but he cannot prohibit them from seeing and conversing with her whenever they please, for if he were to do so, it would induce *Katta Rihm*, or a breach of the ties of kindred, and their seeing or conversing with her is in no respect injurious to him. Some have said that he cannot prohibit them from *coming in* to her, any more than from *conversing* with or seeing her, but he may prevent them from *residing* with her, as this might cause disturbance and inconvenience. Others have said that he cannot prohibit his wife from going to visit her parents, nor prevent the parents from visiting her every Friday; neither can he forbid her other relations from visiting her once a year; and this is approved.

Maintenance
to the wife of
an *absentee*
is decreed
out of his
substance,

If a woman's husband absent himself, leaving effects in the hands of any person, and that person acknowledge the deposit, and admit the woman to be the wife of the absentee, the *Kâzee* must decree a maintenance to her out of the said effects; and the same to the infant chil-

* Although, by the customs of the east, men are not permitted to enter into the women's apartments without especial permission, yet it is not uncommon to converse with a woman through a *curtain*, or (as some part of this passage seems to imply) through a *grate*.

dren of the absentee, and also to his parents. And the rule is the same if the *Kázee* himself be acquainted with the above two circumstances, where the trustee denies both or either of them.—The argument upon which this proceeds is that where the above person acknowledges the woman to be the wife of the absentee, and also, that he has property of the latter in his hands, such acknowledgment amounts to an avowal of her being entitled to receive her right out of the said property, without the husband's consent, as a woman is authorized to it by law.

OBJECTION.—If a woman be decreed her maintenance out of the effects of her absent husband, in consequence of the trustee's acknowledgment, this admits the judgment of a magistrate against an absentee, which is illegal.

REPLY.—The order of the *Kázee* is not in this case *directly* against an absentee, but only *virtually*, and *by implication*, because the above person is the *Zoo-al-Yed*, or immediate possessor of the property, and the acknowledgment of such an one is to be credited in any thing affecting his trust, but more especially in the present case, since if he were to deny either the marriage or the deposit, it would not be in the woman's power to sue him, for if she do so, and produce witnesses in support of her plea, their evidence could not be received, as a trustee cannot be sued on a plea of marriage; nor can the woman appear as plaintiff against him with respect to the property in his hands, since she is not the husband's agent: and the trustee's acknowledgment being credited, the *Kázee*, in consequence of it, issues a decree for the wife's maintenance, which must affect the husband of course; and the decree of a *Kázee*, affecting an absentee in this way, is approved.—If, moreover, the property of the absentee be in the hands of the person aforesaid in the way of *Mozáribat*, or as a *debt*, the rule holds the same as if it were a *deposit*.—What is now said supposes the property to be of the same nature with the woman's right, such as *money*, *grain*, or *cloth*: but where it is otherwise, a maintenance must not be decreed out of it, because, in this case, it cannot be furnished from it

unless that be
of a nature
different from
what is neces-
sary to her
support:

but by selling a part, and defraying the expence of it out of the amount; and all our doctors agree that the property of an absentee cannot be *sold*.—*Haneefa* is of this opinion, because the *Kâzee* cannot sell the effects even of a person *on the spot*, but must require him to sell them, and discharge the maintenance with the amount; and consequently he is prohibited from selling the property of an absentee, *a fortiori*. The two disciples also are of the same opinion, because, although they hold that the *Kâzee* may dispose of the property of a person on the spot, for the discharge of his wife's maintenance, without his consent, yet this is only where he *refuses* to do so; but the property of an absentee cannot be thus disposed of, as his refusal is not known.

but she must give security that she has not already received any thing in advance.

WHEN the *Kâzee* decrees a woman her maintenance out of the effects of her absent husband, it behoves him to take security from her for whatever she receives for the indemnity of the absentee, as it is possible that she may already have received her maintenance in advance, or that she may have been divorced, and her *Edit* be passed; and the *Kâzee* must also require her to make oath that she has not received any part of her maintenance in advance: contrary to a case where the *Kâzee* makes a distribution of inheritance among present heirs, according to evidence, and they do not deny any knowledge of another heir, for in this case he does not require a similar security from them in behalf of another heir, who may hereafter appear, because the *Makfool-le-hoo*, or *suretee*, is there unknown and undefined; but in the present case the suretee is *known*, being the absent husband.

It can be decreed only to the wife, infant children, or parents of the absentee.

A KÂZEE cannot decree maintenance, out of the effects of an absentee, in behalf of any but those already mentioned, (namely, the wife, infant children, and parents of the absentee,) as they alone are authorized to receive a maintenance independant of any decree of the *Kâzee*, (that, in the present case, being only *in aid* of their right,) whereas

whereas the other relations within the prohibited degrees are not entitled to any maintenance without a decree of the *Kâzee* previously obtained for that purpose, as the obligation of it with respect to them varies according to circumstances, wherefore the *Kâzee* decreeing it to them would amount to a judgment against an absentee, which is not allowed.

If the *Kâzee* himself be not assured that the woman is the wife of the absentee, and the trustee, factor, or debtor, do not acknowledge her to be so, and she should offer to produce witnesses to prove that she is so,—or, if the absentee should not have left any effects, and she offer to prove her marriage by evidence, with a view to obtain a decree authorizing her to procure a maintenance upon the absentee's credit, still the *Kâzee* cannot issue a decree accordingly, because this would be a judgment against an absentee, which is inadmissible.—*Ziffer* says that it is the duty of the *Kâzee* to hear the proofs, and (although he cannot decree the marriage to be thereby established) to order her a maintenance, as this is a tenderness due to her, and no injury to the absentee, because, if he should afterwards appear and confirm her assertion, she has only taken what was her right,—or, if he should deny the marriage, an oath will be tendered to her, (in case of her having no witnesses,) and if she decline swearing, his assertion remains established; but if she prove her assertion by evidence, her right is established; and if she cannot produce any proof, and he swear, she or her bail then remain responsible.—The author of this work says that it is the duty of the *Kâzee*, in the present instance, to decree maintenance to the absentee's wife, from necessity.

No decree
can be issued
against an
absentee's
property
upon the bare
testimony of
his wife.

S E C T. III.

A divorced
wife is en-
titled to
maintenance
during her
Edit.

WHERE a man divorces his wife, her subsistence and lodging are incumbent upon him during the term of her *Edit*, whether the divorce be of the reverfible or irreverfible kind.—*Shafeï* fays that no maintenance is due to a woman repudiated by irreverfible divorce, unlefs ſhe be pregnant.—The reaſon for maintenance being due to a woman under reverfible divorce is that the marriage in ſuch a caſe is ſtill held to continue in force, eſpecially according to our doctors, who on this principle maintain that it is lawful for a man to have carnal connexion with a wife ſo repudiated.—With reſpect to a caſe of *irreverfible* divorce, the arguments of *Shafeï* are twofold; FIRST, *Kattima Bint Kays* has ſaid, “ My huſband repudiated me by three divorces, and “ the prophet did not appoint to me either a place of reſidence or a ſub-
“ ſiſtence;”—SECONDLY, the matrimonial propriety is thereby terminated, and the maintenance is held, by *Shafeï*, to be a return for ſuch propriety, (whence it is that a woman’s right to maintenance drops upon the death of her huſband, as the matrimonial propriety is diſſolved by that event;)—but it would be otherwiſe if a woman repudiated by irreverfible divorce be pregnant at the time of divorce, as in this caſe the obligation of maintenance appears, in the ſacred writings, which expreſsly direct it to a woman under ſuch a circumſtance. The argument of our doctors is that *maintenance* is a return for *cuſtody*, (as was before obſerved,) and *cuſtody* ſtill continues, on account of that which is the chief end of marriage, namely *offspring*, (as the intent of *Edit* is to aſcertain whether the woman be pregnant or not,) wherefore ſubſiſtence is due to her, as well as lodging, which laſt is admitted by all to be her right; thus the caſe is the ſame as if ſhe were actually pregnant; moreover, *Omar* has recorded a precept of the prophet, to the effect that “ *maintenance is due to a WOMAN divorced*
“ *thrice*

“ *thrice during her* EDIT :”—there are also a variety of traditions to the same purpose.

MAINTENANCE is not due to a woman after her husband's decease, because her subsequent confinement [during the term of *Edit*, in consequence of that event,] is not on account of the right of her *husband*, but of the *law*, the *Edit* of widowhood being merely a *religious* observance, whence it is that the design of ascertaining the state of her womb is not in this instance regarded, and accordingly the *Edit* is not counted by the menstrual terms, but by *time*; maintenance is moreover due to a woman from day to day, and the husband's right in his property ceasing upon his decease, it is impossible that any maintenance should be made due from what is, after that event, the property of his heirs.

No maintenance due to a widow:

WHEN the separation originates with the woman, from any thing which can be imputed to her as a *crime*, such as apostatizing from the faith, or having carnal connexion or dalliance with the son of her husband, she has no claim to maintenance during *Edit*, since she has deprived her husband of her person unrighteously, in the same manner as if she were to go out of his house without permission.—But it is otherwise where the separation originates with the woman from a circumstance which cannot be imputed to her as a crime, as in a case of option of puberty or manumission, or of a separation demanded by her on account of inequality, in all which cases she remains entitled to maintenance during *Edit*, as she has here legally withdrawn herself from her husband, in the same manner as where she keeps herself from him on account of nonpayment of her dower.

nor to a wife in whom the separation originates,

unless it originate in a circumstance not criminal.

IF a woman under triplicate divorce apostatize from the faith, her maintenance drops; but if one in the same circumstance admit the son of her husband to carnal connexion, still her right to maintenance continues, because here the divorce has not been caused by the apostacy

A wife who apostatizes has no right to maintenance.

or

or the incest of the woman:—but the apostate is imprisoned until such time as she may repent; and a husband is not under any obligation to provide a maintenance for his wife if she be a prisoner, whereas a woman who admits the son of her husband to carnal connexion is not liable to imprisonment on that account; which makes an essential difference between the two cases.

S E C T. IV.

A father must provide for the maintenance of his infant children.

THE maintenance of infant children rests upon their father; and no person can be his associate or partner in furnishing it, (in the same manner as no person is admitted to be associated with a husband in providing for the maintenance of his wife,) because the word of God, in the *Koran*, says “THE MAINTENANCE OF THE WOMAN WHO SUCKLES AN INFANT RESTS UPON HIM TO WHOM THE INFANT IS BORN,” (that is, upon the *father*,) from which it appears that the maintenance of an infant child also rests upon the father, because, as maintenance is decreed to the nurse on account of her sustaining the child with her milk, it follows that the same is due to the child himself, *a fortiori*.

A mother is not required to suckle her infant,

except where a nurse cannot be procured.

If the child be an infant at the breast, there is no obligation upon the mother to suckle it, because the infant's maintenance rests upon the father, and in the same manner the hire of a nurse; it is possible, moreover, that the mother may not be able to suckle it, from want of health or other sufficient excuse, in which case any constraint upon her for that purpose would be an act of injustice.—What is here advanced proceeds upon a supposition of a nurse being easily procured

procured; but where this is not the case, the mother may be constrained to take that office upon herself, lest the infant perish.

It is the part of a father to hire a woman to suckle his infant child, as this is a duty incumbent upon him; and it is necessary that the nurse so hired stay with or near the mother, if the latter desire it, as the child must be with its mother, she having the right of *Hizânit*. But it is not lawful for the father to hire the *mother* of the child as its nurse, if she be his wife, or divorced from him; and in her *Edit*,—because, although suckling her child be not incumbent upon a mother in point of *law*, yet it is so in point of *religion*, the word of God in the *Koran* saying “IT BEHOVES MOTHERS TO SUCKLE THEIR CHILDREN;”—and a mother is excused from this duty only on the supposition of incapacity, but if she agree to perform it for a *compensation*, this is an acknowledgment of her capacity, making the duty incumbent upon her without any consideration whatever. This rule obtains (as above observed) where the mother is either actually the *wife* of the father, or reversibly divorced from him, and in her *Edit*, in which case the marriage still continues in force; and (according to one tradition) this also is the rule, where the mother is in her *Edit* from *irreversible* divorce; but another tradition says that such a person may be lawfully hired by the father as a nurse, because her marriage no longer remains in force.—The argument in favour of the former tradition is that the marriage still continues in force with respect to some of its obligations, such as the provision of *food*, *lodging*, and so forth.

The father must provide a nurse;

but he cannot hire the child's mother in that capacity;

BUT a father may lawfully hire, to suckle his child, one of his wives, who is not the child's mother, as suckling it is not a duty incumbent upon *her*.

yet he may hire any other of his wives for that purpose;

HE may also lawfully hire the mother of the child herself for this office, where her *Edit* from divorce has been completed, because when

or the child's mother, after the expiration of her *Edit*.

that is past the marriage no longer remains in force in any respect, and the woman may then be hired as well as any indifferent person.—In this case, however, if the father offer to hire any strange woman to suckle his child, and the mother offer to perform that office either for the same hire, or gratis, she has the prior right, as it is to be supposed that she feels a tenderness for the child beyond any other person, wherefore regard for the child dictates that it should be committed to her in preference to any other. But if the mother require *higher* wages than the stranger, the father cannot be compelled to give her a preference, as this would be injurious to him.

Difference of religion makes no difference as to the obligations of furnishing maintenance to a wife or child.

The maintenance of an infant child is incumbent upon the father, although he be of a different religion: and, in the same manner, the maintenance of a wife is incumbent upon her husband notwithstanding this circumstance;—the *first*, because the word *offspring*, in the sacred text, (as before quoted) is of general application, and also because the child is a partaker of the father's flesh and blood, and consequently is a part of him;—and the *second*, because the occasion of the obligation of maintenance (namely, a *valid marriage*,) may exist between a *Musliman* and an *infidel* woman.

The maintenance of children incumbent upon the father only where they possess no independent property.

It is to be observed that what has been asserted respecting the maintenance of infant children being incumbent upon the father obtains only where the child is not possessed of any property:—but where the child is possessed of property, the maintenance is provided from *that*, as it is a rule that every person's maintenance must be furnished from his own substance, whether he be an *infant* or an *adult*.

S E C T. V.

It is incumbent upon a man to provide maintenance for his father, mother, grandfathers, and grandmothers, if they should happen to be in necessitous circumstances, although they be of a different religion;—for his father and mother, because the text of the *Koran*, upon this point, was revealed respecting the father and mother of a *Mussulman*, who were *infidels*;—and for his grandfathers and grandmothers, because a grandfather is as a father, and a grandmother as a mother, the former being vested with the authority of a father, in all points of guardianship and inheritance, in defect of the father, and the grandmother being the mother's substitute, in defect of her, with respect to *Hizánit*, and so forth: but their poverty is made a condition of the obligation, because, if they be possessed of property, their maintenance must be provided from *that*, rather than from the property of any other person:—and difference of religion is no objection, with respect to *grand* parents, because of the text abovementioned:—it is to be observed, however, that in the case of difference of religion, a man is under no obligation to provide maintenance for any except his wife, his parents, grand parents, children, and grand children, to all of whom it is due, notwithstanding this circumstance;—to the *wife*, because (as was already stated) the cause of the obligation of maintenance to her is *custody for the purpose of enjoyment under a valid contract*, and the establishment of this cause does not depend upon unity of sect or religion, as it perfectly exists where the wife is a *Christian* (for instance) and her husband a *Mussulman*;—and to the parents and others, as enumerated above, because between the child and the parent exists a common participation of blood, and he who participates of another's blood is, in fact, the same as the partipatee himself; and as a man's infidelity is no objection to his providing his own maintenance

A man must provide a maintenance for his indigent parents.

Difference of religion forbids the obligation to the maintenance of any relations except a wife, parents, or children:

and to those
also it is not
due if they be
aliens.

nance out of his own property, it follows that the same circumstance can be no objection with respect to one who is *a part* of him.—But if those relations be *aliens*, their maintenance is in no degree incumbent upon a *Mussulman*, although they be *Moostámins**, because the law-giver has forbidden us from shewing kindness to those with whom we are at war on account of religion.

*Christian and
Mussulman
brothers are
not obliged
to maintain
each other.*

THERE is no obligation upon a *Christian* to provide maintenance to his brother, being a *Mussulman*; neither is a *Mussulman* under any obligation to provide for the maintenance of his brother, being a *Christian*; because (according to what appears in the sacred text) maintenance is connected with inheritance; and as a *Mussulman* and *infidel* cannot inherit of each other, it follows that the maintenance of either is not incumbent upon the other:—it is to be remarked, however, that this rule does not obtain with respect to the other effects of consanguinity; for if a *Mussulman* become possessed of his *Christian* brother, as a slave, the latter is virtually emancipated, on account of nearness of kindred, notwithstanding the difference of religion.

The maintenance of a parent is exclusively incumbent on the child.

THE maintenance of a father and mother is incumbent upon their child alone, wherefore no man can be his partner or associate in furnishing it to them, because parents have a right in the property of their child, (according to various well known traditions,) which they do not possess with respect to that of any other person; and also, because the child is more nearly related to his parents than to any other person whatever.—The maintenance to parents is equally incumbent upon a daughter as upon a son, according to the *Zâhir-Rawâyet*; and this is approved, because the principle upon which the obligation of it is founded applies equally to both.

Maintenance to other re-

It is a man's duty to provide maintenance for all his infant male

* That is, residing in the *Mussulman* state, under a protection.

relations

relations within the prohibited degrees, who are in poverty; and also to all female relations within the same degrees, whether infants or adults, where they are in necessity; and also to all adult male relations, within the same degrees, who are poor, and disabled or blind: but the obligation does not extend beyond those relations, because the duties of consanguinity are not absolutely incumbent towards any excepting the nearer (or *Karreebat*) degrees of kindred, and do not extend to the more *distant* degrees, as this would be impracticable: on this occasion, moreover, the *necessity* is made a condition of the obligation; and tenderness of sex, or extreme youth, or debility, or blindness, are evidences of this necessity, since persons from these circumstances are rendered incapable of earning their subsistence by labour; but this rule does not apply to parents, for if they were to labour for a subsistence, it would subject them to pain and fatigue, from which it is the express duty of their child to relieve them; and hence it is that maintenance to parents is incumbent upon the child, although they should be able to subsist by their own industry.

lations, besides the wife, parents, or children.

MAINTENANCE is due to a relation within the prohibited degrees, in proportion to inheritance; in other words, upon him who has the greatest right of inheritance in the said relation's estate the largest proportion of maintenance is incumbent,—and upon him who has the smallest right, the smallest proportion,—and so of the others,—because it is said in the *Koran* “THE MAINTENANCE OF A RELATION “WITHIN THE PROHIBITED DEGREES RESTS UPON HIS HEIR,” and the word *heir* shews that in adjusting the rate of maintenance the proportion of *inheritance* is to be regarded.

THE maintenance to an adult daughter, or to an adult son who is disabled, rests upon the parents in three equal parts, two thirds being furnished by the father, and one third by the mother, because the inheritance of a father from the estate of his son or daughter is *two thirds*,

A father and mother must provide a maintenance to their adult daughters, (and also to their adult

sons who are disabled, in proportion to their respective claims of inheritance.

thirds, and that of a mother *one third*. The compiler of the *Hedāya* remarks that this is the doctrine of *Khasāf* and *Hāsan*. According to the *Zābir-Rawāyet*, the whole of the maintenance to these rests upon the father, the word of God being thus expressed, “THE SUBSISTENCE OF CHILDREN RESTS UPON THOSE TO WHOM THEY ARE BORN,” (as was before mentioned,) and the person to whom they are born is the father, wherefore their maintenance rests upon him, in the same manner as that of his infant children: but the former doctrine proceeds upon the idea of there being two points which make an essential distinction between *infant* children and *adults*, with respect to the father; FIRST, a father is invested with the authority of guardianship over his infant child;—SECONDLY, the maintenance to his infant child is expressly declared to rest solely and exclusively upon him: but with adults it is otherwise, as a father has no right of guardianship over them, wherefore the mother is to assist him in furnishing their maintenance in case of necessity; and as, in the maintenance of *other* relations, the proportion of *inheritance* is regarded, so in the present case, in conformity with that rule.

Sisters must furnish maintenance to an indigent brother, in the same proportion.

THE maintenance of a brother, in poverty, rests upon his *full*, *paternal*, and *maternal* sisters, in five shares, according to their degrees of inheritance; that is to say, three fifths must be furnished by the *full* sisters, one fifth by the *paternal* sisters, and one fifth by the *maternal*.—It is to be observed, however, that to the obligation of furnishing maintenance to a poor relation, the *capability* of inheritance only is a condition, and not the *prior* or *more immediate right*; thus if a poor man have a rich maternal aunt, and also a rich paternal uncle’s son, his maintenance rests upon the *former* in preference to the *latter*, although the *latter* would inherit of him in preference to the *former*, for this reason, that a maternal aunt is within the prohibited degrees, whereas a cousin-german is not.

THE

THE maintenance of a relation within the prohibited degrees is not incumbent upon his heirs, if they be of a different religion, because, in this case, they are incapable of inheriting from him, which is the condition of the obligation.

THE maintenance of relations within the prohibited degrees is not incumbent upon a person in poverty, because it is an obligation (like the other duties of consanguinity) which cannot be fulfilled by one who, on account of his situation, has a claim to that very assistance from *others*. But this argument does not hold with respect to a *wife* or *infant child*, for whom it is incumbent upon a man to provide subsistence, notwithstanding his poverty, because in marrying he subjects himself to the expence of maintaining his wife, as otherwise the ends of marriage would be defeated,—and his child, from participation of blood, is a part of himself, (as was before observed,) for whom it is therefore his duty to find support as much as for himself.

A poor man is not required to support any of his relations except his wife or infant children.

ABOO YOOSAF defines the term *rich*, as used in this chapter, to apply to a person possessed of property to the amount of a single *Nisâb*. *Mohammed* says that it means a person possessed of property above what may suffice to support himself and family one month,—or whose superfluity from his daily earnings enables him to afford it,—because the obligation, in acts of piety, depends upon the ability *generally*, and not upon any specific degree of it, *Nisâb* being a proportion invented merely for convenience: decrees however pass according to the former opinion. By the *Nisâb* here mentioned is understood that which is so small as to prohibit alms-giving; for instance, *two hundred DIRMS*; and *Hawlân-Hâwl*, or possession for a year, is not a condition of it; whence, if a man were, from a state of poverty, to become possessed of two hundred *Dirms* as *this day*, the maintenance of his poor relations becomes immediately incumbent upon him.

Definition of the term *rich*, as here used.

IF

Maintenance
to the parents
of an absentee
may be de-
creed out of
his effects.

IF an absent son be possessed of property, a maintenance to his parents is to be decreed out of it, for the reasons already mentioned: and if a father were to sell his absent son's effects, for the purpose of providing his maintenance, it is held by *Haneefa* to be lawful, on a principle of benevolence; but he cannot lawfully sell his *lands*. The two disciples say that the sale of his *effects* is also illegal; and this is conformable to analogy, because a father has no absolute authority over his adult son, and therefore is not empowered to sell his effects in his presence on any pretence, nor to do so in his absence but for the discharge of debts which do not include maintenance; and the same reasoning applies to the *mother*. The reason for the more favourable construction, as adopted by *Haneefa*, is that a father is authorized to take charge of his absent son's effects; for as the conservation of an absentee's property is allowed to devolve upon his *executor*, it must be admitted that it appertains to his *father* in a superior degree, as he is more immediately interested; and the sale of moveable property is one part of conservation; wherefore the father is at liberty to sell his absent son's moveable property: but this reasoning does not apply to *lands*, these not being subject to conservation, as they do not require it; neither does it apply to any other than a *parent*, as the more distant relations are not endowed with any absolute authority whatever over an *infant*, nor with any power of conservation over the effects of an *adult*.—And where a father thus sells the property of his absent son, if the price he receives for it be of the same nature with his right, (namely, *maintenance*,) he is at liberty to take his right therefrom: and in the same manner, if a father dispose of the effects or lands of his infant son, he is at liberty to take his maintenance out of the price, that being of the same nature with his right.

The parents
of an absentee
may take their
maintenance
out of his ef-
fects: but a

IF the effects of an absent son be in the hands of his parents, and they take their maintenance from them, they are not responsible, as what they take in this manner is their right, a maintenance being their due, independant of any decree from the *Kâzee*; but if the ef-
fects

fects be in the hands of a stranger, and he furnish the maintenance to the parents therefrom, without a decree from the *Kázee*, he is responsible, as he in that case takes upon him to dispose of the property of another without authority, since he is no more than merely the absentee's agent for conservation: (contrary to where he acts under the *Kázee*'s orders, in which case he is not responsible, as those are absolute and indispensable:)—and being thus responsible, he has no right to seek indemnification from the parents, because in assuming the responsibility, he, in fact, becomes *proprietor*, and then appears to have given the property to the parents gratuitously.

trustee cannot provide it in that manner without a decree.

IF the *Kázee* decree a maintenance to children, or to parents, or to relations within the prohibited degrees, and some time should elapse without their receiving any, their right to maintenance ceases, because it is due only so far as may suffice, according to their necessity, (whence it is not so to those who are *opulent*,) and they being able to suffer a considerable portion of time to pass without demanding or receiving it, it is evident that they have a sufficiency, and are under no necessity of seeking a maintenance from others: contrary to where the *Kázee* decrees a maintenance to a *wife*, and a space of time elapses without her receiving any, for her right to maintenance does not cease on account of her independance, because it is her *due*, whether she be *rich* or *poor*.—What has been observed on this occasion applies to cases only in which the *Kázee* has not authorized the parties to provide themselves a maintenance upon the absentee's credit: but where he has so authorized them, their right to maintenance does not cease in consequence of a length of time passing without their receiving any, because the authority of the *Kázee* is universal, and hence his order to provide a maintenance upon credit is equal to that of the absentee himself, wherefore the proportion of maintenance for the time so elapsed is a debt upon the absentee, and does not cease from that circumstance.—The time here meant is any term beyond a *month*; and if the time elapsed be short of that term, maintenance does not cease.

Arrears not due in a decreed maintenance,

unless where it is decreed to be provided upon the absentee's credit.

S E C T. VI.

Maintenance
of slaves in-
cumbent
upon their
owner.

THE maintenance of male and female slaves is incumbent upon their owner, because the prophet has said concerning them, “ *they are your brethren, whom God has placed in your hands, wherefore give them such food as ye yourselves eat, and such raiment as ye yourselves are clothed with, and afflict not the servants of your God:*” if, therefore, the owner do not provide their maintenance, and they be capable of labour, they must be permitted to work for their own subsistence, as this is tenderness not only to the slave, but also to his master, being equally advantageous to both, since the life of the slave is thereby preserved, at the same time that the owner’s property in him continues unaffected.—But if the slave be incapable of labour, (as where a *male* slave, for instance, is deprived of the use of his limbs, or where a *female* is unfit to hire on account of extreme youth or tender habit,) the owner must then be compelled either to provide their maintenance, or to sell them, because slaves are claimants of right notwithstanding their bondage, and by sale their right is obtained, at the same time that the owner’s right is also preserved to him by his acquisition of an equivalent in the price for which he disposes of them.—This rule does not hold with respect to other living property, (such as *horses*, and so forth,) because cattle are not claimants of right, and consequently the owner is not compelled to an alternative with respect to them, as in the case of slaves: but yet men are directed to furnish their cattle with subsistence on a principle of piety, as the neglect of this is cruelty towards the creature, and at the same time destructive of property, which is forbidden by the prophet.—*Abou Yoosaf* is of opinion that the owner of cattle may be *compelled* to furnish them a proper and sufficient subsistence: but it is the more approved doctrine that he is not liable to any compulsion on that head.

HEDAYA.

H E D A R A.

B O O K V.

Of ITTÂK, or the MANUMISSION of SLAVES.

ITTÂK, in its primitive sense, implies *power*: in the language of the law it signifies a power by effect, existing in a man, which endows him with competency in evidence, and also in authority, (such as *magistracy*, and so forth,) enabling him to act with respect to others, and to repel the acts of others with respect to himself, in consequence of the extinction of his bondage.

Definition of
the term.

Chap. I. Introductory.

Chap. II. Of Slaves of whom a portion or member is emancipated.

Chap. III. Of the Emancipation of one of several Slaves.

Chap. IV. Of Manumission by *Hilf*, or *Vow*.

Chap. V. Of Manumission for a Compensation.

Chap. VI. Of *Tadbeer*.

Chap. VII. Of *Isteelâd*, or *Claim of Offspring*.

CHAP. I.

The emancipation of slaves recommended.

ITTÂK, or the emancipation of slaves, is recommended by the prophet, who has declared “*whatever MUSSULMAN shall emancipate a slave (being a believer,) GOD will, for every member of the slave so liberated, release a similar member of the emancipator from hell fire.*”—It is therefore laudable in a man to release his slave, or in a woman to grant freedom to her bondmaid, in order that this deliverance of GOD may be thereby secured to to them*.

Conditions which render emancipation valid.

EMANCIPATION is approved, where it proceeds from a free person, of sound understanding, and an adult, with respect to a slave who is his own property. Freedom is made a necessary condition in the emancipator, because *Ittâk*, or manumission, is not applicable to any except slaves, and a slave cannot be the proprietor of a slave†; and maturity of age is equally a condition, because a boy (for instance) does not possess competency to emancipate a slave, as this is an act

* Arab. “*In order that the exchange of a limb for a limb may be secured.*”

† It is to be observed that the restriction here mentioned does not apply to *Mokâtibs* and *Mazoons*, but only to *Abids*, or others, in a state of *absolute* slavery.

productive

productive of evident damage to him, (whence it is that the guardians of a minor are not empowered to emancipate any of the slaves of their ward;) and sanity of intellect is also a condition, because a lunatic is incapable of any independent act.

IF an adult declare that he had in his non-age released a certain slave, his words are to be credited, because he here stands as a *negator* of manumission*, as he refers the manumission to a period in which he was not competent to pronounce it.—And in the same manner, if a rational person declare that he had released such a slave “*whilst he was insane,*” his declaration is to be credited, provided his insanity had been a matter of notoriety, as he is a negator, on account of his referring the manumission to a state which forbids it.—If, on the other hand, a boy were to say “every slave of which I am possessed is free on my majority,” it is not approved, as the declaration of an infant is not binding upon him.—It is to be observed that one condition essential to manumission is that the slave be the *actual property* of the emancipator; and hence, if a person were to pronounce or grant an emancipation with respect to the slave of *another*, it is ineffectual, because the prophet has declared “*there is no emancipation with respect to a thing of which MAN is not the proprietor.*”

Expost declarations of manumission, referred to a time when the emancipator was incompetent, are invalid.

IF a person say to his male or female slave—“you are *free*,”—or, “you are *Moattick* †,”—or, “you are *Atteek* ‡,”—or, “you are consecrated to God,” and so forth,—or, “I have emancipated you,”—or—“rendered you a *Moattick*,” or—“consecrated you to God,” and so forth,—in this case such slave becomes immediately free, whether emancipation may have been the intention of the speaker

If a master address his slave by any term which denotes his being *free*, it is a valid emancipation;

* That is to say, he appears as a *defendant*, pleading *against* manumission, and not as a suitor pleading *for* it.

† The participle from *Ittāk*, which may be rendered either *free* or *manumitted*.

‡ The noun of quality from *Ittāk*, which bears nearly the same sense with *Moattick*.

or not, because these modes of address expressly signify manumission, as being received in that sense both in law, and also in common use. And should the person thus addressing his slave afterwards declare that he had only spoken in *jest*; or that, by the terms *free*, *Moáttick*, and so forth, he meant no more than to intimate that he [the slave] was released from *work* or *labour*, his declaration is still to be credited in a *religious* view *, since these expressions bear such constructions; but yet it is not credited with the *Kázee*, as those constructions contradict the evident tenor of the emancipator's words.

If a man call to his slave, saying “O, *Moáttick*!”—or, “O, freeman!” the slave is thereby emancipated, as these are vocatives pronounced in terms expressly signifying manumission, and which require the condition of *freedom* to exist in the person to whom they are addressed: he is accordingly emancipated,—except where the proper name of the slave coincides with the address, as if (for instance) the slave's name be *Hoor*, (that is, *free*,) and his master should call or speak to him by that term, for in this case the term is intended (not as the *description of a quality*, but) merely as an *appellative*.—If, however, the slave have a name differing in *terms* but corresponding in *sense*, as if his name were *Hoor*, [that is, in the *Arabic* language, *free*,] and the owner should call to him in the *Persian* language, saying, “O, *Azad*!” [which has the same signification,] the learned hold that the slave is in this case emancipated; and so also, if a person should call to his slave whose name is *Azad*, saying “O, *Hoor*!” because, in both these cases, the term by which the slave is addressed is not his *appellative*, and must therefore be regarded as *descriptive*, which requires that the slave be *free*.

and so also, if
he annex the
emancipation

If a man say, either to his male or female slave “your *neck*, (or) “*back*, (or) *head*, is free,” or to his female slave, “your *pudendum*

* That is to say, with regard to his conscience.

“is released,” such male or female slave is thereby emancipated, because by these expressions the whole person is necessarily implied, as has been already explained in the Book of Divorce.—And if a man apply emancipation to any diffusive portion of the body, saying to his slave “an half of you is free,”—such portion of the slave becomes emancipated accordingly.—In this, however, there is a difference of opinion which shall be hereafter explained.

to any *part* which figuratively implies the *whole person*; and so likewise (proportionably) if to any *diffusive portion* of the person.

If a man apply emancipation to any specific part of the body which is not explained to imply the whole person, (such as the *hand* or *foot*, for instance,) it will have no effect either totally or partially.—This is the opinion of our doctors.—*Shafei*, however, opposes it.—The arguments respecting it have been recited in the Book of Divorce.

If a man say to his slave “I have no property in you,” thereby intending manumission, the slave is emancipated;—but he is *not* emancipated if manumission be not the intention, because this mode of speaking does not only bear the sense of a sentence of emancipation, but it may also imply *sale*, or any other mode of transfer of propriety, as if the master were to declare “that he possessed no property in such a slave, having *sold* (or *bestowed*) him;” and neither of these constructions can be ascertained but by the intention.—And the same rule obtains in all implied expressions of emancipation, such as “I have no property in you,”—or, “you owe me no service,” and so forth; because as those expressions bear the sense of *emancipation*, so do they likewise bear the construction of *sale* or *gift*, or emancipation by *ransom*; and hence the intention is necessary, in order to ascertain which sense the expression is to be construed into.

In implied expressions emancipation depends upon the *intention*:

If a man say to his female slave “*Atlikto-ke*,” (that is, I have parted with you,) it is the same as if he had said “I leave you to your own way.”—This is recorded as an opinion of *Abou Yoosaf*, and is merely

merely a distinction made by him (on account of similarity of sound) between this term and *Tillikto-ke*, (that is, I have *divorced* you,) for if a master were to speak thus to his bondmaid, she does not in virtue thereof become emancipated, although such were the intention of the speaker.

but intention is of no effect in the use of expressions which do not bear the sense of emancipation.

IF a man say to his slave "I have no *sovereignty* over you," thereby intending manumission, yet the slave is not emancipated, because the expression here used implies *power to dispose of absolutely*, and there are cases in which property may remain without a right to the exertion of such a power, as in the instance of a *Mokâtib*; contrary to the expression before alluded to, "I have no authority over you," since dereliction of authority cannot be understood independent of relinquishment of property, as a master still retains authority over his *Mokâtib* for the purpose of exacting the fulfilment of his *Kitâbat*, and accordingly a sentence which expresses a dereliction of authority bears the sense of *an emancipation*.

A master declaring his slave to be his *son* amounts to manumission;

IF a man say of his slave "this is my son," and persevere in his assertion by afterwards avowing the truth of it, such slave is emancipated. Our author, however, observes that this consequence follows only where the respective ages of the master and the slave are such as admit of the former being supposed the father of the latter. Where it is otherwise, the subject shall be exemplified in another place.—It is to be observed, that if the *parentage* of the slave should not be a matter of public notoriety, this also is established in his master, by virtue of his declaration, because a right of claim exists in the master in virtue of the right of property, and the slave is in need of an establishment of parentage;—and the parentage being established in the master, the slave becomes free, because the existence of his descent, as from his master, is connected with the instant of his conception,

* The property in whom cannot be transferred either by *sale* or *gift*.

and

and hence it appears that the master was the owner of his *own child*, which being directly contrary to law, the freedom of the latter becomes a necessary consequence.—But if the parentage of the slave should happen to be a matter of public notoriety, (that is to say, if his birth and descent be already known and ascertained,) it cannot be established in his owner; but the slave is nevertheless emancipated, as the expression in question must be received, if not in its *literal*, yet in its *figurative* sense, lest the words of the speaker, who is supposed a rational person, should be rendered nugatory.

If a man say of his slave “this is my *Mawla**,” the slave becomes liberated, although the master should have no positive intention in this declaration; because the term *Mawla*, notwithstanding that it bears many meanings, such as an *assistant*, a *nephew*, a *redeemer*, an

and so also,
if he declare
him to be his
Mawla,

* With respect to slaves, the mutual relation existing between the *emancipated* and his *emancipator*. This word has a vast variety of senses, and has long been the occasion of much contention between the sects of *Alee* and *Omar*. It is related that when *Mohammed* made his last pilgrimage to *Mecca*, he stopped at a place on the road called *Ghadeer*, and having there constructed a pulpit of the pannels of camels, and called together his companions to the number of 70,000, he then took *Alee* by the hand, and, mounting the pulpit, asked the people whether he was not better than them?—and on their answering in the affirmative, he said, “*then ever such as I am MAWLA so also is ALEE; whoever is his friend is mine, and whoever is his enemy is mine:*” and on his descending, the people shouted applause; “*and OMAR (it is added) was one of the first to congratulate ALEE on this accession of power.*”—The *Shiyas* [followers of *Alee*] adduce this story as a convincing proof of the justness of *Alee*’s title to the succession; whilst, on the other hand, the *Soonis* [followers of *Omar*] maintain that, the word *Mawla* meaning an *assistant*, this speech implied nothing more than that *Alee*, after the prophet’s decease, should *assist* the *Mussulmans* in the manner he [the prophet] had done; which, indeed, *without* this injunction, it was his duty to have done: but the *Shiyas* again maintain that whatever doubt, from the variety of meanings, may be attached to this word, the particular circumstances of the case prove it beyond a question: moreover, *Mohammed*, it is allowed, knew of his approaching death, as the pilgrimage he was then upon was undertaken on that account; to what end, therefore, could he have performed a ceremony of this kind, with such circumstances of formality, were it not to declare his *successor*? and this opinion (they allege) is corroborated by the circumstance of his death happening soon after, and without his having appointed a successor.

emancipator, and also *a slave emancipated*, yet is here to be taken in the last sense only, since a master does not commonly require any aid from his slave,—and the parentage of the slave is notorious,—which forbid its being taken in the *first* or *second* sense;—and the *third* is merely figurative, whereas words are legally to be construed in their *literal* sense; and the application of it to a slave forbids its being taken in its *fourth* sense; wherefore it must necessarily be received in its *last* acceptance; and such being the case, the term stands as an express manumission, which is accordingly established, independant of intention. And the same rule holds if a master should say of his female slave, this is my *Mawlat**, on the grounds already stated.—If the man also who uses this expression were afterwards to say that his intention thereby was to express *Mawla-Mawalát* †, or that (acknowledging the word to bear its *last* acceptance, as before recited) he was not *serious* in so expressing himself, however this may coincide with his own conscience, yet it is not to be admitted with the magistrate, as it contradicts appearances.

or address
him by that
term.

If, however, a man should use the term *Mawla* to his slave in the *vocative*, saying “O, my *Mawla*!” the slave is liberated; because, as it must be received in its *last* sense (for the reasons before mentioned) it stands as an express emancipation; and as vocatives in other instances are considered in the light of express emancipation, where the speaker, addressing his slave, says “O, *Hoor*!” or, “O, *Atteek*!” and so forth, inducing the liberation of the slave, so also in the present case.—*Ziffer* maintains that the slave is not in this case rendered free but through the intention of the speaker, because it may sometimes happen that this expression is meant merely as a mark of *kindness*, or *fond regard*, in which sense it is frequently used, the same

* The feminine of *Mawla*.

† A person connected with another in general interests, by a mutual compact. It is a term used to express any *peculiar intimacy* of connexion.

as “*my child!*” or, “*master!*” the use of which words from a master to his slave does not constitute emancipation unless by the intention of the speaker.—Our doctors, on the other hand, allege that a word must be taken in its *literal* sense in preference to any other; and an *emancipated person* is the literal sense applicable upon the present occasion, as has been already demonstrated; and as it is capable of bearing its *literal* sense on this occasion, it must be so received: contrary to the terms *child*, *master*, and so forth, because in these words no meaning is found peculiarly applicable to emancipation, such phrases being used merely as expressions of kindness and affection.

IF a man address his slave, saying “O, my son!” or, “O, my brother!” the slave is not liberated, because the intention of a vocative expression is merely to distinguish the person who is addressed by it: for although, where the speaker addresses the slave by a descriptive term, in its sense applicable from him to the person he addresses, it must be taken as fixing that description upon the latter, (the speaker appearing in his own mind to apply it to the person he thus addresses, the same as if he were to call to him by the term *freeman*,) and the slave accordingly becomes liberated, for the reasons already assigned,—yet where a person calls to his slave by a term not at all applicable from him to the slave, the intention of the address appears to be merely a *distinguishing appellative*, not fixing any *particular description* upon the person called to, as that of *son* is not applicable, since the slave so addressed is the progeny of another person and not of the speaker.—It is recorded in the *Rawâyet Shaz*, as an opinion of *Haneefa*, that the slave in the present case becomes liberated: but the authority of the *Zâbir-Rawâyet*, as before stated, is the most worthy of credit.

Addressing the slave, personally, as if he were a son or a brother, does not amount to manumission.

IF a man say to his slave, “O, son!” the slave is not emancipated, because this simply expresses a truth; to wit, that *the slave is the son of his own father*.

Cafe of a
slave declared
to be the *son*
of his master
under cir-
cumstances
which render
this *impossible*;

IF a person should say of his slave "this is my son," where the slave could not possibly be conceived to be the son of the speaker*, yet the slave (according to *Abou Yoosaf*) is emancipated, independant of his master's intention.—The two disciples maintain that the slave is not liberated, although such be the intention; and *Shafei* coincides in this opinion; for they argue that the expression, in the present case, is not at all applicable, and must be regarded as nugatory, in the same manner as if a man were to say to his slave "I emancipated you before I was born,"—or, "before *you* were born."—*Haneefa* argues, in support of this opinion, that although the expression in question cannot be taken in its *literal* sense, yet it may be taken in its *figurative* sense, (viz. "this slave is free from the hour I first possessed him,")—because, supposing the slave were really the son of the master, his filial relation would occasion freedom, that being the effect of it; and as it is allowable to intend the effect by a figurative mention of that which is its cause, so the expression now under consideration must be taken in its *figurative* sense, in order that it be not rendered nugatory: contrary to the case of a man saying to his slave "I released you before I was born,"—or, "before you were born,"—because here no figurative sense can be applied, as none can be conveyed or implied under such a mode of expression, and hence those words are to be regarded as nugatory.

or the parent;

IF a man should say of his bondfman "this is my father,"—or, of his female slave, "this is my mother," where such person could not have been begotten or born of such male or female slave†, there is, in this case, the same difference of opinion between *Haneefa's* doctrine and that of the two disciples, as is recorded in the preceding case.—And if a man should say of his slave, being a boy, "this is my grandfather," some lawyers have said that here also the same dif-

or grand pa-
rent.

* As if (for instance) the slave were *older* than his master.

† As (for instance) the person so speaking were *older* than the slave of whom he speaks.

ference of opinion obtains: but other authorities assert that the slave in this instance does not stand liberated, according to all the doctors, because this expression is not the occasion of freedom to a slave, but through the intermediation of the more immediate relative, namely, the *father*, who is not here mentioned, so that it cannot bear the construction of *freedom* by *implication*: contrary to where a man says of his slave, “this is my *father*,”—or, “my *son*,” because these words occasion freedom to the slave without including any other intermediate person.

If a man say of his slave “this is my brother,” yet the slave is not emancipated, according to the *Zâbir Rawâyet*.—It is recorded, as an opinion of *Aboo Haneefa*, that the slave is rendered free.—The reasons upon which the *Zâbir Rawâyet* proceeds are the same here as in the preceding case; and the opinion of *Haneefa* is founded upon what has been already mentioned in the case of a man saying to his slave, “O my *son*!”—or, “this is my *son*.”

A man declaring his slave to be his brother is not *manumission*.

If a person say of his male slave “this is my *daughter*,” some authorities say that the learned differ in opinion concerning the effect in this case: others, however, assert that all the doctors agree in opinion, that the slave is not emancipated, because the person addressed is not of the sex mentioned; and as the effect is connected with the thing mentioned, and that does not exist, it follows that the address must be regarded as nugatory. The arguments in this point have been already detailed under the head of *Marriage*.

Expressions altogether inapplicable are nugatory;

If a man say to his female slave, “you are simply divorced,”—or, “completely divorced,”—or, “veil yourself*,” by any of these intending manumission, yet she is not emancipated.—*Shafeï* asserts that she becomes free, where such has been the speaker’s in-

and so also, formulas of divorce applied to female slaves.

* See Book of Divorce, Chap. II. Sect. VI.

tention.

tention.—The same difference of opinion obtains in all expressions of divorce used towards a slave, whether *express* or *implied*, according to what is alleged upon this head by the followers of *Shafëi*, whose argument herein is, that the speaker intends a thing which the expression he uses bears a construction of, because between possession by marriage and possession by right [namely, *by bondage*] there is a resemblance, as they both amount to *substantial* possession; the latter is evidently so;—and the former is also such in effect, and not of the class of *usufructuary* possessions, (whence it is that *permanency* is one of its essential conditions, and that rendering it *temporary* annuls it,) for if it were merely an usufructuary possession, like hire, it would not be annulled by restricting its duration to any particular time; and the effect of a sentence of divorce in the one case, or of manumission in the other, is to destroy the right of the proprietor, (whence it is that the suspension of it upon a condition is approved,)—but it does not go to *establish* any thing, since if such were the case suspension would not be approved, because the suspension of an establishment of possession upon a condition (as in sale, where a man says, “I will sell such an article provided the pilgrims arrive,”) is disapproved.

OBJECTION.—*Ittāk* is an *establishment* of power, not a *dissolution* of it, whence it is that its effects take place, such as competency in authority and in evidence, and so forth; so that this does not resemble *divorce*, which is purely of a destructive nature.

REPLY.—*Ittāk* is a destruction of property; but the aforesaid effects are established by it for a reason which had previously existed, namely, the slave's being in an oppressed state.—Now there being this resemblance between divorce and manumission, expressions of *emancipation* and *freedom* may be figuratively used for *divorce*, which accordingly takes place where such is the intention, and so *vice versa*.—Our doctors, on the other hand, argue that the person here mentioned (supposing the emancipation of the slave to have been his intention) has meant and intended a thing which the words he uses do not bear the sense of, because the term *Ittāk*, in its literal sense, means “*en-*
“ *dowing*

“*dowing with power*,” and *Talák* “*the removal of restraint*,” and a slave is a *dead matter*, transferable by sale or otherwise, and incompetent to any independant act; but by virtue of *Itták* he becomes alive, and capable of acting for himself;—whereas a *wife*, on the contrary, is already possessed of all her natural rights and competency, under the restraint of *marriage* only, which, in some particular instances, (such as *going abroad*, and so forth,) debars her from the exercise of them; but this restraint being removed by *Talák* [divorce,] her independant rights, which were before obscured under the matrimonial subordination, but not *annihilated*, become again apparent: now it is evident that the establishment of a *new* right in any person is a more forcible act than the simple *removal of restraint* in a right already existing; and so also possession by *right* is of a more absolute nature than possession by *matrimony*; and hence the destruction of the *former* is a more forcible act than that of the *latter*; and any word used in an implied sense admits a construction of *equal* or of *less* weight than its literal meaning, but not of *greater*; whence it follows that *Talák* [divorce] cannot figuratively be taken as intending manumission, although the *reverse* of this be legal and valid.

IF a man say to his slave “you are equal to a freeman,” yet he is not emancipated, unless such be the intention, because the term *equal* is, in common use, associated with a variety of ideas, so that its sense, as expressive of the quality of freedom existing in the person addressed, is dubious.

IF a man say to his slave “you are not otherwise than free,” such slave becomes emancipated, because the exception thus affixed to a *negative* amounts to a confirmation of the *affirmative*.

IF a man say to his slave “your head is the head of a freeman,” he is not emancipated, because this is merely a *comparison*, expressed with

with an ellipsis of the comparative term "*like*:" but a slave is emancipated by his master saying to him "your head is a free head," because his *freedom* is fully acknowledged by that phrase, since from the *head* the whole person is necessarily understood.

S E C T I O N.

No person
can be a slave
to a relation
within the
prohibited
degrees.

IF a person become possessed of a slave who is his relation within the prohibited degrees *, such slave by that act acquires his freedom. This is recorded as an ordinance of the prophet, and comprehends all kindred within the prohibited degrees, whether standing within the *parental* connexion, such as *fathers*, *mothers*, *sons*, and *daughters*, or independant thereof, such as *brothers*, and so forth.—*Shafei* restricts the operation of this rule to relations of the first class only.—His argument is that the establishment of manumission independant of the consent of the proprietor is contrary to analogy; and as the *fraternal* and other connexions are not of equal weight or moment with the *pater-
nal*, the case does not admit that the former should be connected with the latter, either by analogy, or by arguments drawn from the sacred writings,—whence it is that if a *Mokâtib* were to purchase, as a slave, his *brother* or *uncle*, such relation does not become a *Mokâtib* in conformity to the condition of the purchaser, but still continues an *absolute slave*; whereas, if a *Mokâtib* were to purchase his *father* or *child*, the person purchased is no longer a slave, but becomes a *Mokâtib* in conformity to the condition of the purchaser, and is rendered *free* by the *Mokâtib* himself obtaining his freedom in consequence of the fulfilment of his contract of *Kitâbat*.—The arguments of our doctors are

* See *Matrimony*, Chap. II.

twofold;—FIRST, the ordinance recorded of the prophet, as already stated, which comprehends all degrees of kindred under the description of *prohibited*; SECONDLY, the reason of a parent or child being rendered *free*, in the present case, is the affinity which occasions prohibition, and a restriction to the *parental* degree of kindred is nugatory and inadmissible, because the preservation of any connexion which occasions prohibition is enjoined as indispensable, and to break it off is forbidden,—(whence it is that a man is required, if necessary, to furnish subsistence to *every* relation within the prohibited degrees, and also, that marriage with them is forbidden,) and the same reason applies in degrees of kindred not *parental*, such as the *brother* or *uncle*. It is to be observed that this rule extends to *infidels* within the *Musfulman* territories, as well as to *Musfulmans*, and also to *minors* and *lunatics*, the reason of prohibition above mentioned applying equally to all these descriptions.—And in reply to what *Shafeï* has advanced in support of the doctrine of his sect with respect to *Mokâtibs*, it is to be remarked that where a *Mokâtib* purchases, as a slave, his *brother*, or any other relation of the more remote degrees, (such as his *uncle* or *aunt*,) the person purchased is not rendered a *Mokâtib*, because the power of a *Mokâtib* over his property is not of a full or complete nature, so as to enable him to perform the act of emancipation; and the preservation of a kindred connexion is incumbent and enjoined only where such a power exists: but the case is otherwise where a *Mokâtib* purchases, as his slave, his *parent* or *child*, who thereupon becomes also a *Mokâtib*; for the liberation of parents and children must be considered as one design of the contract of *Kitâbat*,—because, as the intention of a slave, in entering into such a contract, is (eventually) to procure his own *freedom*, so is it to procure that of his *parents* or *children* also, their bondage being as grievous and degrading to him as his own; and this being the case, the sale of the parent or child of a *Mokâtib* is forbidden, and they become free on the payment of the ransom, in order that all the ends of the contract or *Kitâbat* may be obtained.—*Aboo Haneefa* makes this rule extend to the *fraternal* as

well as to the *paternal* connexions of a *Mokâtib*; and in this opinion the two disciples also coincide; it does not however extend to the fraternal connexion of *foster brother* or *foster sister*, because they are prohibited, *not* from connexion of *blood*, but of *fosterage*.

Manumission is valid, independent of the design of it,

IF a master emancipate his slave, whatever the predisposing cause urging him to that act may be, whether he do it from *religious* motives, or at the instigation of the devil, or in observance of any idolatrous superstition, the emancipation is equally legal and valid, as proceeding from an authorized person, (the *possessor*,) and affecting its proper object, (the *slave*.)

and of the state of the emancipator.

THE emancipation pronounced by a profligate or a drunkard is also legal for the same reason.

A reference of manumission to a future event, or a suspension of it upon a condition, are *valid*, in the same manner as in *divorce*.

IF a person refer emancipation to the act of possession, (as if he were to say to the slave of another, “if ever I become your master, “you are free,”)—or, if he were to suspend the emancipation of his own immediate slave upon a condition, saying “if you enter such a “house, you are free,” such reference or suspension are approved, as well as in *divorce*. The reference of emancipation to possession is held to be illegal by *Shafeï*, as is particularly stated in the book of divorce: all the doctors, however, coincide in the validity of the suspension of emancipation upon a condition expressed, because *Ittâk* is held in law to be purely a *direliction* of a right, in which suspension is of course admitted:—contrary to any act amounting to a *transfer* of a right, (as *jale*, for instance,) the suspension of which is illegal, as is explained in its proper place.

Slaves deserting from a foreign service, and embracing the faith, are *free*.

IF the slave of an infidel alien, becoming a convert to the faith, retire into the *Mussulman* territory, he is free, because when the slaves from the countries around deserted their masters, and came into and embraced

embraced the doctrines of the prophet, he declared,—“ *these are the freed-men of God;*” and also, because the slave, at the time he delivers himself up, is a *Mussulman*, and bondage is not established in a *Mussulman* originally.

IF a man emancipate his female slave, she being pregnant, the *fœtus* becomes also emancipated, in consequence of the manumission of the mother, as it is connected with her in the same manner as one of her members:—but if the master were to emancipate the *fœtus* only, and not the *mother*, the former alone is free.—It is to be observed that the *manumission* of a *fœtus* is approved, but not the *sale* or *gift*, because delivery is a condition of *gift*, and the power of delivery a condition of *sale*, and neither of these can take effect until after the birth; but *delivery*, or *power* of delivery, are not essential conditions of *emancipation*, and therefore are not requisite to validate it.

The fœtus of a pregnant female slave partakes of her emancipation.

IF a person agree to emancipate the *fœtus* in the womb of his female slave for a compensation, the *fœtus* is free, but the compensation is not due, because it is impossible that any compact should be made binding upon an *embryo*, as no person has power over it until after the birth;—nor can it be made so upon the mother, because the *embryo* is (with respect to *emancipation*) altogether distinct from *her*, and to stipulate a return for freedom, binding upon any but the *person liberated*, is contrary to law, as has been already shewn in treating of *Khoola*.—It is here necessary to observe that the existence of pregnancy is not supposed at the period of emancipation, unless the delivery follow within the space of six months after.

Emancipation of a fœtus, for a compensation, is valid, but the return is not due.

THE child of a female slave, begotten by her master, is free, because such child derives its existence from the master's seed, and is therefore free, radically, as it is a rule that that which is created from the seed of a free person is itself free. The seed of the female slave also

The child of a master, born of his female slave, is free.

does not in any respect traverse or oppose that of the master, since her feed is the property of her master, because the mother's connexion with her child is more intimate than that of the father, in virtue of her right of *Hizânit**; or, because the husband's feed is consumed in that of the female slave, as her own feed remains with her in its proper and original place, whereas that of the husband, proceeding from him, mixes with her's, and is consequently lost and expended in it.

OBJECTION.—Respect is paid to preference only where two things are opposed to each other; but here an opposition between the two feeds is not admitted.

REPLY.—An opposition appears in this case between the two feeds, inasmuch as *freedom* opposes *bondage*.

OBJECTION.—It would appear that the child should be free, as well as the child of a *Magroor*†, since the father, in the present case, does not will the bondage of his child.

REPLY.—The husband, in the above case, certainly wills the bondage of his child, being previously aware of that consequence; for when, knowing this, he agreed to marry the mother, his consent thereto is established: contrary to the case of a *Magroor*, who, acting under a deception, cannot be supposed to will the bondage of his child.

THE child of a free woman is free, whether her husband be a free-man or a slave, because the mother's connexion with it is more intimate than that of the father, (for the reason already mentioned,) so that a child is a dependant of its mother in freedom, as well as in bondage, or in any other less absolute description of slavery, such as *Kitâbat*, and so forth,—that is, if the mother be an absolute slave, the

A child born of a free-woman is free, under all circumstances.

* See Book of Divorce, Chap. XIV.

† One acting under a deception.

child

child is so likewise, although the father (who is the husband of the slave) be *free*,—or, if the mother be a *Modabbira*, the child is born in that state, as a dependant on its mother,—and so of the rest.—If, moreover, a man bestow his *Am-Walid* in marriage upon any person, and she produce a child, such child stands in the predicament of an *Am-Walid*;—that is, it becomes free on the death of the owner of the mother, as well as the mother:—and in the same manner, if the mother be a *Mokâtiba*, the child is a *Mokâtib*, as being a dependant of the mother.

CHAP. II.

Of Slaves of whom a *Portion* or *Member* is emancipated.

IF a master release a portion of his slave, (his *half*, for instance,) the slave is in such proportion *free*, and must work out the remainder of his value by *Siâyet*, or emancipatory labour*. This is the doctrine of *Haneefa*.—The two disciples maintain that the slave, in the present instance, becomes emancipated *in toto*.—This difference of opinion is founded in the different tenets of *Haneefa* and the two disciples respect-

A slave partially emancipated must work out the remainder of his freedom.

* By *Siâyet* is meant *work* or *labour* of any kind. It is a principle in the *Mussulman* law that no person can remain *partially* a slave, but that any circumstance which in its nature establishes the emancipation of a *part*, provides for, and necessarily induces, the eventual emancipation of the *whole*; and hence the rule that a slave partially emancipated works out the remainder of his value at an ascertained rate, being in some measure in the state of a *Mokâtib*: *Siâyet* is, therefore, rendered *emancipatory labour*; and by the word *labour*, throughout this book, *emancipatory labour* is to be understood.

ing the nature of emancipation; the former holding that it is capable of division, and therefore that whatever part or portion of a slave may be emancipated by his master, such part or portion only is immediately affected thereby,—whereas, the two disciples hold it to be altogether incapable of division or partiality, (in which opinion *Shafei* also coincides,) and hence, that the application of manumission to any particular part or portion of a slave stands as an application to the whole, and consequently that the slave becomes emancipated *in toto*;—for they argue that the meaning of emancipation is *the establishment of the quality of freedom*, and the quality of freedom is a power both *real* and *virtual*, and this is established by the destruction of its opposite, namely, *bondage*, which is a virtual inability; now this power and inability not being capable of division, it follows that *Ittak* or manumission, which is the establishment of this power, is also incapable of division, in the same manner as *divorce*, the *remission of retaliation*, and the *establishment of parentage*.—The argument of *Haneefa* is, that manumission means the establishment of the quality of freedom by the destruction of propriety, or it means simply the destruction of propriety,—because the propriety is the right of the master, and the bondage is a right of all *Mussulmans*, or, in other words, a right of the LAW, since it is the penalty of infidelity, and the infliction of this penalty is a right of God; but the master has no power to destroy the right of *another*, (namely, *bondage*,) being merely entitled to destroy *his own* right, (that is, *his propriety*,) whence it is established that manumission is the destruction of propriety; now, as it is proved that manumission is the destruction of propriety, and as propriety is capable of division, it follows that manumission is also capable of division; but it is necessary that the slave should labour, because the propriety of the master with respect to *a part* of the slave is involved in the slave. It is to be observed that a slave upon whom labour is incumbent is held by *Haneefa* to stand in the predicament of a *Mokâtib*, because the application of manumission to any particular part or portion occasions the slave's becoming his own master *in toto*, (according to the arguments of the two-disciples,)

and the continuance of the owner's propriety in *a part* (as drawn from the arguments of *Haneefa*) controverting this, the matter is thus settled, with a regard to the reasoning on both sides, by placing a slave who is *partially* emancipated in the predicament of a *Mokâtib*, who is his own master, as far as respects a power of action, or rights of seizure, but not in respect to *bondage*; and the labour he performs for the remainder of his freedom is a substitute for ransom; it therefore belongs to the owner of the slave to require this labour of him, and also to emancipate him, if he pleases, since a *Mokâtib* is a proper subject of emancipation, as well as an absolute slave:—but between the slave in question and a *Mokâtib* there exists this difference,—that if the slave should not be equal to the performance or fulfilment of his labour, he is not therefore liable to revert to his former state, as an *absolute slave*; whereas a *Mokâtib*, when unable to perform the stipulation of his *Kitabât*, reverts to his original state of bondage, because the emancipation of a part of a slave is a positive destruction of propriety in such part, and therefore is irreverfible,—but *Kitabât* is a *contract* capable of dissolution or annulment:—in fhort, a slave of whom a part or portion is emancipated becomes placed in a middle state,—that is, in a state between that of an *absolute slave*, and that of an *absolute freeman*, nearly analogous to the state of a *Mokâtib*, excepting only the difference above recited, as fuch a middle state is here conceivable: contrary to cafes of *divorce* or *remiffion of retaliation*, which do not admit of any medium, and of which a *part*, therefore, fands as *the whole*.—*Haneefa* holds that *Isteelad*, or *claim of offspring*, is alfo capable of divifion, whence, if a man were to create his portion in a female copartnership fave an *Am-Walid* *, provided fuch fave be a *Modâbbira*, fhe becomes *Am-Walid* in the part or portion fo conftituted only; but if fhe be an *absolute fave*, fhe in this cafe becomes wholly *Am-Walid* to the partner conftituting her fuch in part, he becoming refponfible for the other portion of her to his partner whofe fhare in her he has by that act de-

* By claiming or acknowledging a child born of her. See *Isteelad*.

ftroyed;

stroyed; and such being the case, he obtains possession of her *in toto* in consequence of his taking upon him this responsibility; he accordingly becomes *sole proprietor*; and she is his *Am-Walid in toto*.

Manumission by one partner of a share in a partnership slave induces his complete emancipation, upon his performing emancipatory labour to the other partner.

If a man emancipate his portion in a copartnership slave, such slave becomes free *in toto*,—(that is, has a claim to ultimate freedom:)—and if the emancipator be *rich*, his partner [in the slave] has three things in his option; he may, if he please, agree to the freedom of his portion in the slave without any compensation,—or, he may require indemnification from his partner for the value of his share in the slave,—or, he may require the slave to procure the freedom of his remaining portion by labour, as before stated; and if he chuse the *second* of these, he [the emancipator] has a claim upon the slave for the amount; and in this case the *Willa** rests solely with the emancipator;—or, if the other partner prefer the *first* or the *third* mode abovementioned, the *Willa* rests equally with both: but, if the emancipator be *poor*, his partner in the slave has two things in his option,—he may either agree to release his portion in the slave, or he may require him to perform *labour*;—and in either case the *Willa* rests equally with both partners.—This is according to *Haneefa*.—The two disciples say that if the emancipating partner be rich, the other partner has no right to any thing but a compensation for the value of his share; or, if the emancipator be *poor*, to require labour of the slave.—The foundation of this difference of opinion rests upon two points;—*one*, that manumission is divisible, according to *Haneefa*, and undivisible, according to the two disciples;—*another*, that the circumstance of the emancipator being *rich* is not held by *Haneefa* to oppose any objection to labour,—whereas the two disciples hold the requisition of labour by the partner to be in this

* *Willa* is a species of right to the property of another founded upon some act of assistance or generosity previously exercised towards him. Thus the emancipator of a slave possesses a *Willa* with respect to his *freedman*, in virtue of which he inherits to his estate in the default of other heirs: and, according to some, the emancipator, in virtue of his *Willa*, has also a right to all the slave's effects of the period of *emancipation*. See Book XXXIII.

case inadmissible, on the authority of a tradition of the prophet, who said (concerning a person emancipating his portion in a coparcenary slave) “*If he be RICH, he must indemnify his partner for the value of his portion in that slave,—but if POOR, the slave must work out his remaining portion of bondage by LABOUR,*”—which is a proof that indemnification is alone admissible in the *first* of the above cases, and labour in the *second*.—The argument of *Haneefa* is that, as the property of the second partner’s portion is involved in the slave, it belongs to him to require indemnification for the amount from the slave, (in the same manner as where a piece of cloth is blown, by the wind, into the vat of a dyer, and the cloth becomes coloured, in which case the proprietor of the cloth must pay the cost of dying, whether he be rich or poor, because of the loss sustained by the dyer, in so much of his colours expended,)—but a slave not being possessed of any property, he is to require labour of him in lieu thereof.—It is to be observed that the term *rich**, mentioned in these cases, implies no more than that the emancipator be possessed of property to such an amount as may enable him to be responsible for the value of his partner’s share in the slave, because thus much suffices to the satisfaction and convenience of both parties,—in fulfilling the design of the emancipator by establishing the freedom of the slave, which is a virtuous and acceptable act,—and also, in securing to the other partner his right, namely, the value of his share in the slave.—When we consider the different tenets of *Haneefa* and the two disciples, as aforesaid, the ground upon which the doctrine of the latter (according to their tenets, in the present case) may be accounted for is evident;—and the exposition of the doctrine of *Haneefa* (according to his tenets) is that an *option of manumission* appertains to the other partner, because of his right in his share still remaining, as manumission is (according to *Haneefa*) capable of division,

* There are two descriptions of wealth in the language of the law; the first *Yisâr Tey-seer*, which may be translated *competency*; the second *Yisâr Ghannee*, or *opulence*; the former is the description which is treated of in this place.

and *option of indemnification*, because of the emancipator, in destroying *his own* share, having destroyed that of his partner also, as it is no longer transferable by sale or gift,—and *option of labour*, because of his property in his share being involved in the slave:—with respect to what is further advanced by him, that if the other partner chuse indemnification for his share, the emancipator has a claim upon the slave for the amount, it may be accounted for in two ways; FIRST, the emancipator, in consequence of indemnifying his partner, stands as his substitute; and as it would have been lawful for the other partner to take the value of his portion in the slave by requiring labour of him, so in the same manner it belongs to the emancipator to exact of the slave whatever he may have given to his partner as an indemnification for his share, since he now stands in his place; SECONDLY, the emancipator, by indemnifying his partner, becomes the owner of his portion in the slave; and thus stands in the predicament of a person who, being sole proprietor of a slave, has emancipated a part or portion of him,—and hence he is at liberty either to emancipate the remaining portion, or to require labour of the slave for the value thereof.—The *Willa* here rests solely with the emancipator, because the slave has obtained his freedom entirely through him, since he, by indemnifying his partner, became sole proprietor.—This is supposing the emancipator to be *rich*:—but if he be *poor*, the other partner may either emancipate his share, (since his property in it still remains,) or he may require labour of the slave; and in either case the *Willa* of his share appertains to him, as in *both* the freedom of that share proceeds him: and here the slave has no claim upon the emancipator on the score of labour performed by him to the other proprietor, because (as *Haneefa* argues) he has performed the labour for the obtaining of his freedom, or (as the two disciples contend) because it cannot be decreed to be a debt upon the emancipator, since he is poor:—contrary to a case where the pawner of a slave, being poor, emancipates the slave whom he has pledged,—for in that case the slave has a claim upon him for the labour which he in consequence performs to the *pawnee*:—
this

this claim he has, according to *Haneefa*, because he is thus obliged to labour for his value *after being emancipated*,—and, according to the two disciples, because the earnings of his labour, which he pays to the *pawnee*, is a debt due by the pawner, from whom the slave is therefore entitled to demand it. The opinion of *Shafeï*, upon the case where the emancipator of his share in the slave is *rich*, coincides with that of the two disciples;—but where he is *poor*, *Shafeï* contends that full authority still remains with the other partner, with respect to the disposal of his share, either by *sale*, *gift*, or otherwise, because it is not reasonable that he should demand indemnification of the emancipator, who, being *poor*, is incompetent to answer it,—nor can he require labour of the *slave*, who has not committed any offence to justify the exaction of extraordinary labour from him, and has no will in the act of the emancipator, since the will or assent to an act cannot be conceived without a previous knowledge of that act, which is not supposed in this case, as the emancipator performs it independently of him; and it is not reasonable that the slave should become emancipated *in toto*, as this would be an injury to the partner;—from all which it follows that the right and authority of the second partner over his portion of the slave remains unaffected, and stands the same as before. In reply to this reasoning our doctors contend that the requisition of labour is reasonable, because the propriety of such a requisition does not depend upon the commission of an offence, but is founded (in the present instance) on the idea of the property of the second partner's share being involved in the slave, as has been already repeatedly stated; there is therefore no necessity that *power* (namely, the existence of the *quality* and *privileges* of *freedom*) and *inability* (which is incompatible with that power) be united in one and the same person.

If each of two partners should testify or declare that the other had emancipated his portion, in this case the slave must perform labour to each partner on account of his respective share, according to *Haneefa*, whether the parties be *rich* or *poor*, (or if one of them be *rich* and the

In case of counter-declarations of manumission, by the partners in a slave, he is

emancipated,
and must per-
form emanci-
pationary labour
for each
partner.

other *poor*,) because each partner asserts that the other has emancipated his share, and hence (agreeably to the doctrine of *Haneefa*) the slave is as a *Mokâtib* in the conception of both, so that it is not lawful for either to make him an *absolute slave*; the declaration of both therefore is to be credited; and as neither can make him an absolute slave, each partner is at liberty to require his labour for the value of his share, because the right of requiring labour is established in each indisputably, whether his declaration may have been false or true; for the slave is either his *bondsman* in the former supposition, or his *Mokâtib* in the latter; each partner, therefore, is to require labour of the slave, whatever his circumstances may be, whether *rich* or *poor*, because the right of each is one of two things,—indemnification from the emancipator, or labour from the slave,—the competency of the emancipator to indemnify his partner not being regarded by *Haneefa* as any obstruction to the requisition of labour; and as, in the case here supposed, indemnification cannot justly be required by either partner of the other, (since each controverts the other's assertion,) nothing remains but that *labour* be required.—And here it is to be observed that the *Willa* of the slave rests equally with both partners, as each respectively says “ my partner's share is emancipated by his manumission, and the “ *Willa* of it consequently appertains to him, and my share is eman- “ cipated from me by labour, and consequently the *Willa* of it appertains “ to me.”—The two disciples allege that if both the partners be rich, labour is not due from the slave to either, because each discharges him from this obligation, by advancing a claim for emancipation against the other, (since they hold that competency of wealth in the emancipator forbids labour;) but the claim is not established on account of the negation of the respondent, whereas the discharge of the slave from labour is established by the declaration of each respectively. But if both the partners be *poor*, the slave must in that case perform labour to each, because each advances a claim for labour against the slave, whether they speak truly or falsely, as the alleged emancipator is *poor*.—And if one of the partners be *rich*, and the other *poor*, the
slave

slave must perform labour to the former, because he cannot be supposed in this case to sue for *indemnification* from his partner, who being poor is incompetent to grant it; and hence nothing remains but that the rich partner require labour of the slave, from which he has not released him by the nature of his testimony; but the slave does not owe any labour to the indigent partner, whose declaration must be interpreted into a claim of indemnification from his partner, since he is *rich*.—In all these cases the *Willa* of the slave is undetermined, (according to the two disciples,) because each of the two owners relinquishes it to the other, who on his part rejects it, wherefore it remains suspended until such time as both agree in their testimony respecting the partner who first emancipated his portion.

If one of two partners should say to their joint slave—“ if such a
 “ one enter *not* this house to-morrow, you are free,” and the other partner should at the same time say “ if such an one *should* enter this
 “ house to-morrow, you are free,”—and the morrow should pass without its being known whether such person had entered the house or not, in this case the slave becomes emancipated in one half, and performs labour to each of his owners for the remaining half*.—This is the doctrine of *Haneefa*; and *Aboo Yoosaf* coincides with him, provided both the partners be *poor*; but he alleges that if one of these be *rich* and the other *poor*, the slave must perform labour to the *former* in the proportion of one quarter of his whole value; or, if *both* be *rich*, that the slave has not to perform any labour to either.—*Mohammed* says that where both partners are *poor*, the slave must perform labour to each for his *full value*, because it remains unascertained which of the partners has forfeited his right to this advantage, as it is unknown with respect to whom it may have dropped; and a magistrate cannot pass a decree upon a person unknown;—in the same manner as where a man, in a company, says to another, “ there is such a debt

Case of emancipation by two partners, respectively, suspended upon two opposite conditions of uncertified occurrence, with respect to their joint slave.

* That is to say, in the proportion of a quarter to each respectively.

“ due to you from one of us,” in which case the *Kāzee* would not decree any thing, on account of his not knowing upon whom to pass the decree.—If, however, in the case under consideration, one of the partners be *poor*, and the other *rich*, the slave must perform labour for *half* his value to the *latter*, because the *rich* partner cannot be supposed to require indemnification from the *other*, who is *poor*, and consequently nothing remains for him but to require labour of the slave on account of his share, which the slave must accordingly perform:—the poor partner, on the other hand, discharges the slave from any obligation of labour, and nothing remains for him but to require indemnification from his *rich* partner, which is impossible, on account of the doubt respecting the actual emancipator:—but if both partners be *rich*, the slave will not have to perform labour to either in any proportion whatever,—agreeably to the opinion of *Aboo Yoosaf*, as already stated. The argument of *Haneefa* is that one half of labour drops to a certainty, since it is clear that *one* or *other* of the two partners must be the emancipator; and with this proof of the extinction of *one half* of labour, how can the *Kāzee* decree the performance of labour *in toto*?—and the difficulty arising from ignorance, in the present case, is obviated by thus determining *one half* of labour to be done away with respect to *both* partners, indiscriminately,—in the same manner as where a man emancipates *one* of *two* slaves indiscriminately, or *one* of *two* specifically, and afterwards forgets and dies, without (in the first instance) discriminating the emancipated slave,—or (in the second) recollecting him, in either of which cases, the slave who is actually emancipated being unknown, the half of both would be released, and each would perform labour [to their heirs] for the remaining half. This argument of *Haneefa* is also used by *Aboo Yoosaf*, where both the owners of the slave are *poor*:—but, where both the owners are *rich*, the two disciples argue that, as the emancipator of that half of the slave liberated by the occurrence of the condition, whoever of them it be, is *rich*, no labour can be required of the slave by the other partner, (the competency of the emancipating partner’s circumstances forbidding

forbidding labour, according to the two disciples,) and consequently, nothing remains but to require *indemnification*, the right to which drops on account of ignorance of the proper *claimant* and *claimee*.—The argument of *Abou Yoosaf*, in a case where one of the two partners is *poor* and the other *rich*, is that half the labour has dropped to a certainty, since some *one* of the two partners is undoubtedly the *emancipator*; and consequently the other half of labour remains between both partners;—and as he who is poor does not require labour, it follows that the slave has to perform it to his *rich* master only, in the proportion of one fourth of his whole value.

IF two men make a vow, one of them saying—“ if *Zeyd* enter “ this house to-morrow, then such an one, my slave, is free,” and the other, “ if *Zeyd* enter *not* this house to-morrow, then such an “ one, my slave, is free,”—and it happen that the slave of each so mentioned is distinct, and not common property, and the morrow should pass, and it be not known whether *Zeyd* had entered the house or not, neither of these slaves can become emancipated, because the person *against* whom emancipation is to be decreed, (namely, one of the two owners,) and also the one *in whose favour* emancipation is to be decreed, (namely, one of the two slaves,) are both *unknown*, and this being a *great degree* of ignorance, no decree from the *Kázee* can possibly pass respecting it:—contrary to the case before recited, because as *that* supposes *one* slave held jointly between *two* owners, the *object* of the decree, (the slave,) and also the *subject* of it, (the emancipation of one half of the slave,) are known, and nothing, in fact, is unknown, excepting merely *who the emancipated half belongs to*,—and there, consequently, the manumission of the slave is decreed, because the matter *known* exceeds that which is *unknown*.

Case of the same nature with respect to two different slaves.

IF two men make a joint purchase of a slave who is the *son* of one of the parties, the slave becomes emancipated with respect to his *father's* half, and the father does not owe any indemnification to his

A slave jointly purchased by his *father* and a *stranger* becomes emancipated

with respect
to his father's
moiety.

partner for his share, whether he (the partner) may have been aware of the circumstance of the slave being the other's son or not. In the same manner, if these two men should obtain joint possession of the slave by *inheritance*, (as where a woman purchases the son of her husband, and afterwards dies, leaving heirs her *husband* and *brother*,) the slave becomes emancipated with respect to his father's portion in him, and the wife's brother has no claim upon the father for indemnification, but it remains at his option either freely to release his portion, or to require labour of the slave for the same.—This is according to *Haneefa*.—The two disciples allege that in the former case the father must indemnify his partner for half the value of the slave, if he be *rich*, or, if not, that the slave must perform labour in such proportion to his father's partner.—The same difference of opinion subsists where these two persons become possessed of such slave, either by deed of gift, by alms-gift, or by bequest,—and also where two men purchase a joint slave, one of them having previously made a vow, saying “if I buy the half of such a slave he is free.”—The argument of the two disciples is that the *father*, or the *vower*, has rendered void his partner's right to his portion in the slave, by his emancipation, as the act of purchase eventually leads to that issue; and also possession obtained through *bequest*, *gift*, or *alms*;—thus it is the same as where one of two partners emancipates his portion in a copartnership slave, in which case, if he be *rich*, he indemnifies his partner for his share, or, if *poor*, the slave works out his freedom by labour:—and so likewise in the present case.—The argument of *Haneefa* is that the father's partner appears to be assenting to the father's destroying his share, from the circumstances of the case, as having become his partner under a *cause* of manumission, (namely, the purchase of the slave,) which is connected therewith; and as this evinces that he is assenting to the destruction of his own share, he cannot require any indemnification from the father of the slave, since that is *Zimán-al-Ifsád*, or *indemnification for damage*, the right to which is overthrown by the circumstance of the claimant assenting to the damage, in the same manner as where a person

person expressly desires his partner in a slave to emancipate his share,—in which case he has no claim to indemnification.—It is to be observed that what has been recited, in regard to the *father* of the slave not being responsible to his partner in either case, (that is to say, in the case where the partner is acquainted with the circumstance of the slave being the son of his partner,—and also, in the case where he is not acquainted with that circumstance,) is recorded as an opinion of *Haneefa*, and rests upon the establishment of an *argument* of consent, and not upon the establishment of the consent *itself*; on the same principle as if a person should say to another “eat this food,” without knowing that the food is his own property, and the person accordingly eats the food, and this food afterwards proves to have been the actual property of the speaker, in which case this person is not responsible to the other for having eaten his victuals, because the desire expressed by the proprietor is an argument of his consent, although it be probable that if he had known the victuals to be his own property he would not have consented.—It is further to be observed that what is now advanced proceeds upon a supposition of the father being the *first* purchaser, or of the purchase being made by the father and the stranger *jointly*:—but where the *stranger* has first purchased an half, and the *father* afterwards purchases the other half, then, provided the father be rich, the stranger has it in his option to demand indemnification, as he does not in this case appear to be consenting to the father’s destroying his share,—or to require labour of the slave for half his value, as his property therein is involved in the slave.—This is the doctrine of *Haneefa*, deduced from his tenet, that *the wealth of the emancipator does not forbid the exaction of labour*; in this again he differs from the two disciples, who (proceeding upon the contrary tenet) contend that the other partner has no liberty of option in this case, and can only require indemnification of the father for the value of his half.

A man purchasing a share in his son does not owe indemnification.

IF a man purchase a share in his *son* of a person who was before the sole proprietor, and he [the purchaser] be *rich*, yet (according to *Haneefa*) he does not owe any indemnification to the seller, as the latter appears to be consenting to the eventual extinction of his own property, by the act of *sale*. The two disciples (agreeably to their tenet, as before stated,) maintain that if the father be rich he must give indemnification.

Case of a slave held in a tripartite partnership.

IF one of three partners in a slave should constitute his share in such slave *Modábbir*, (that is, free at his decease*,) he being *rich*, and another partner should afterwards emancipate his share, he also being *rich*, and the third partner remain silent,—and the *first* and *third* partners be desirous of taking indemnification, in this case the third partner is to take indemnification to the amount of the third of the slave's full value from the *first* partner,—not from the *emancipator*,—and the *first* partner to take indemnification from the *emancipating* partner, to the amount of a third of the value of the slave, estimating the same at the rate of a *Modábbir* only, and not at the full value, as taken by the *third* partner. This is the doctrine of *Haneefa*. The two disciples allege that the slave devolves solely to the partner who had previously constituted his share *Modábbir*, and who must indemnify his two partners for two thirds of the estimated value of the slave, whether he be *rich* or *poor*.—The foundation of this difference of opinion is, that *Haneefa* holds *Tadbeer* (or the act of constituting a slave *Modábbir*) to be *divisible*, as well as *manumission*: contrary to the tenet of the two disciples, who holding manumission to be indivisible, maintain that *Tadbeer*, as being a *branch* of manumission, is so likewise:—now, on the principle of *Haneefa*, since *Tadbeer* admits of partition with respect to the subject of it, it follows that the *tadbeer* granted by the first partner affects *his* share in the slave only; but as it depreciates the value of both the other partners' shares, each has it in

* See *Tadbeer*.

his

his choice either to constitute his share *Modábbir*,—or to emancipate or make *Mokátib* the same,—or to take indemnification,—or to require labour of the slave,—or (lastly) to leave the matter as it is,—because each still remains in *full possession* of his respective share, but the *value* has become *depreciated* to each by the act of the first partner since in consequence thereof their shares are no longer transferable by *sale* or *gift*: and if one of them remain silent, and the other adopt the option of *emancipating* his share, his right to emancipate is established, but no further option (to take *indemnification*, and so forth,) remains to him: and where such is the case, the partner who continues silent has *two* separate grounds of claim to indemnification for the value of his share,—namely, the act of *Tadbeer* on the part of *one* partner, as depreciating the value of his portion in the slave, and the act of *emancipation* on the part of the *other* partner, as eventually destructive of his right: but he is to require such indemnification of the *former*, rather than of the *latter*, so as that it may be in the manner of *reciprocal indemnification*, by the indemnifier becoming, in consequence thereof, possessed of the thing for which he gives the recompence; because *reciprocity* is the primary idea in indemnification for property; and, in the present case, respect may be had to this primary idea, by the *silent* partner taking the indemnification from the partner who had constituted his share *Modábbir*, and who in consequence becomes possessed of the silent partner's share, as the slave at the time of his third being constituted *Modábbir* is capable of going from the possession of *one* person into that of *another*, since he is as yet an *absolute slave*; whereas if, on the contrary, the *silent* partner were to take the indemnification from the *emancipating* partner, attention to the primary idea is defeated, as the slave, at the time of the emancipating partner liberating his share, is a *Modábbir*, since his act of *emancipation* was posterior to the others act of *Tadbeer*, which rendered the slave incapable of devolving from the possession of one person into that of another: the *silent* partner must therefore take indemnification from the person who had constituted his share *Modábbir*,—after which it belongs

to the *latter* to take indemnification of the *emancipating* partner, to the amount of one third of the value of the slave as a *Modábbir*, because the emancipator has injured his share at a time when it is *Modábbir*; he is therefore to take the *Modábbir*-value of one third, and not the *full* value, which devolved to him from the silent partner in consequence of his indemnifying him.—The *Willa* of the slave is in this case divided between the *Tadbeer* partner and the *emancipating* partner, in the proportion of two thirds to the *former*, and one third to the *latter*, according to the proportions which they retain in the slave at the period of his final emancipation.—What has been advanced on this occasion is according to the tenets of *Haneefa*: but according to the tenets of the two disciples, (with whom *Tadbeer* is held to be *indivisible*,) the slave becomes *Modábbir in toto* to the *first* (or *Tadbeer*) partner, who must indemnify the other two for their respective shares, whether he be rich or poor, as this indemnification is a *Zimán Timmallook*, or *recompence for an assumption of property*, which is not varied by the circumstance of *wealth* or *poverty*;—as where a man makes *Am-Walid* a partnership slave, in which case he is bound to indemnify his partner for his *share* in her, although he be *poor*: contrary to a case where a man emancipates his share in a *partnership* slave, as he is here bound to indemnify his partner for his share, on the condition only of his being *rich*, because the indemnification in that case (according to the tenets of the two disciples) stands as a *Zimán Janáyat*, or *recompence for an offence*: and the *Willa* of the slave rests wholly with the *Tadbeer* partner, as (arguing from the decision of the two disciples) is evident.

Case of a
partnership
female slave.

IF a female slave be held in partnership by two masters, and one of these should declare the said slave to be an *Am-Walid* to his partner, and the partner deny this, the female slave (who had used to perform daily service to each master alternately) remains for the future liberated from any service to either master every second day, on which she is free to work for her own subsistence, performing service to her *denying*

ing master every *intervening* day; but she does not owe *emancipatory* labour to the denying partner*.—This is the doctrine of *Haneefa*.—The two disciples maintain that it belongs to the denying person, in this case, to require labour of her, if so disposed; and having performed this, she becomes *entirely free*;—but nothing whatever remains due from the slave to the partner who made the declaration as aforesaid.—The argument of the two disciples is that, upon the denying partner not confirming the declaration of the affirming partner, the assertion of the latter reverts to himself,—that is, it is the same as if he himself had made his share in the slave *Am-Walid*,—in the same manner as where the buyer, after purchasing a slave, declares that “the seller had released such slave previous to the purchase,” and the seller denies this, in which case the purchaser’s declaration produces the same effect as if he had himself emancipated the slave. And it being thus the same as if the *declaring* partner had himself constituted his portion in the slave *Am-Walid*, the right of the other partner to the use of her is annihilated, because, as it would not have been lawful for the denying partner to require any service from her, (supposing the affirming partner to have actually made her his *Am-Walid* †,) so it is likewise unlawful where he makes her his *Am-Walid* by *construction*: he is, however, at liberty to require labour of her, on account of the value of his share in her, as this still virtually remains his property, under a prohibition of the use;—she therefore is emancipated, in con-

* That is to say, she is released from all service to the *affirming* master, but continues attached in service to the *denying* master, and performs service to him every other day, in the same manner as before the *affirming* partner’s declaration; and does not (in the manner of a slave *partially emancipated*) become free by the performance of *emancipatory labour*, which is a service of another nature, and which the denying master is not at liberty to require of her, because the other partner’s declaration does not amount to a *partial emancipation*, but is a virtual transfer of his property in the slave to the denying partner, who is therefore to pay him a consideration for the same, as appears a little farther on.

† It is a principle in the *Mussulman* law, that where a female slave is held in copartnership, and proves pregnant, and one of the partners declares himself to be the father of the *fœtus*, she then becomes unlawful to the other partners, and an *Am-Walid* to the declarer, who indemnifies them in the value of their shares.

sequence

sequence of labour, in the same manner as the *Am-Walid* of a *Christian* when she embraces the faith.—The argument of *Aboo Haneefa* is that, if the *affirming* partner speak *truly*, the whole service of the female slave is the right of the *denying* partner,—and if he speak *falsely*, yet the *denying* partner is still entitled to the *half* of such service, which is his undoubted right; whereas the *affirming* partner is not entitled to either *service* or *labour*, as he has by his own words relinquished all such claim, in avowing the slave to be the *Am-Walid* of another person: but he is to receive an indemnification from the denying partner for the value of his share in her.—With respect to what the two disciples have advanced, it may be replied that a declaration which goes to constitute a female slave *Am-Walid*, comprehends a declaration of *lineage* or *genealogy*, which cannot be repelled by the mere repulsion of the person concerning whom the declaration is made,—wherefore the case does not admit of the *affirmer* being accounted the same as if he had actually himself constituted the slave *Am-Walid*.

The emancipator of a share in a partnership *Am-Walid* does not owe any indemnification to his partner.

IF an *Am-Walid* become held in partnership between two masters, by both laying claim to a child born of her at the same time, and one of them, being *rich*, emancipate her, he does not owe any indemnification for the other partner's share, according to *Haneefa*. The two disciples say that he must indemnify his partner for half her value.—The occasion of this difference of opinion is that the property in an *Am-Walid* is held, by *Haneefa*, not to be a proper subject of valuation, whereas the two disciples maintain that *it is* so.—The two disciples argue that an *Am-Walid* is capable of producing advantage in various ways to the possessor, by *carnal connexion*, by *hire*, or by *household service*; and this is an argument of valuation; and valuation does not drop in consequence of her becoming *unsaleable*, any more than in the case of a *Modabbir*, who still continues a subject of valuation, although the *sale* of such an one be *forbidden*;—moreover, the *Am-Walid* of a *Christian*, upon becoming a convert to the faith, owes her master emancipatory labour, which is the criterion of valuation in an

an *Am-Walid*.—It is to be remarked that the value of an *Am-Walid* is estimated at the rate of *one third* of her *full* value as a *slave*, (according to what the learned have observed upon this subject,) because, in consequence of a female slave becoming an *Am-Walid*, the single advantage of *usufruct* only remains; but *two* advantages are *forbidden* and *perish*; FIRST, *sale*;—SECONDLY, the performance of labour after her master's decease, either to his heirs, or for the discharge of his debts: contrary to the case of a *Modábbir*, the value of whom is *two thirds* of his estimated value as a *slave*; because *one* advantage only is lost by his becoming *Modábbir*, (namely, the power of disposing of him by *sale*;) but two still remain, (namely, *personal service*, and the performance of labour to the master's heirs after his decease.)—The argument of *Haneefa* is that a thing is supposed to bear a value from the circumstance of its being kept in custody with a view to the acquisition of wealth; but an *Am-Walid* is held in custody, *not* with a view to *the acquisition of wealth*, but for the sake of *her offspring*, to which the acquisition of wealth is only a *secondary* consideration; whence it is that an *Am-Walid* cannot be called upon, after her owner's decease, to perform labour either to his creditors or to his heirs:—contrary to the case of a *Modábbir*, who must perform labour both to the *heirs* and to the *creditors* of his deceased master.—The reason of this is that the *cause* of freedom, with respect to the *Am-Walid*, already exists, namely, the participation of blood established through the means of her offspring, (as was already demonstrated, in treating of *Hoormat Moosábirat*, under the head of *Marriage*;) but as the *effect* of this cause of freedom cannot *immediately* appear, with respect to the dissolution of her bondage, from the necessity of preserving the use of her to her owner, it immediately takes effect so far as to render her incapable of being considered as a *subject of valuation*:—with a *Modábbir*, on the contrary, the cause of freedom is established upon the death of his master;—and hence appears an evident distinction between the case of a *Modábbir* and that of an *Am-Walid*.—The prohibition, with respect to the transfer of property in a *Modábbir* by sale or otherwise, arises from

from the intention of his owner *that he should become free upon his decease*, which could not be, if, after being made a *Modábbir*, he were transferred to another master.—Labour is made due from the *Am-Walid* of a *Christian* (upon her embracing the faith) with a view to the removal of injury from both; and labour stands as the fulfilment of *Kitábat*, the obligation of which does not depend upon valuation in the subject of it, as it is due in return for that which is not property, namely, *freedom*.

C H A P. III.

Of the *Emancipation* of *One* of *several* *Slaves*.

Case of emancipation of one of three slaves undefined.

OF three slaves, if two come into the presence of their master, he being sole owner of the three, and the master say to those two “*one of you is free*,” and one of these slaves should after that depart from his master’s presence, and the *third* come in, who had before been absent, and the master should again repeat his words, saying “*one of you is free*,” and the master should afterwards happen to die, without explaining which of his slaves he meant to be emancipated by the foregoing sentences,—in this case, the slave who was twice addressed, as above, becomes emancipated in *three fourths*, and each of the others in *one half*, according to *Haneefa* and *Aboo Yoosaf*.—*Imám Mohammed* coincides in this doctrine, as far as respects the two slaves who were present at the first declaration; but maintains that the *third* slave is emancipated in *one fourth* only.—The argument, with respect to the two slaves first addressed is, that the first address of the master equally relates

relates to both of them, so as to occasion the emancipation of each in one half, which accordingly takes place in consequence of that address; and again, of him who remains in the master's presence a *fourth* becomes emancipated, by virtue of his *second* declaration, as this declaration is divided equally between the two to whom it is spoken;—but this slave is already entitled to freedom in one half in consequence of the *first* declaration, and the other half remains *unliberated*, and he claims the emancipation of *one half* in consequence of the *second* address; but this claim with respect to the *half* extends to *both* halves of the slave, and therefore the portion of it which reaches the *first* half goes for nothing,—but the portion which reaches the other half (unoccupied by emancipation) still remains, so that another fourth is liberated in consequence of the master's second declaration; and thus *three fourths* are liberated:—moreover, if the master, in his second address, intended it to apply to the slave who continued in his presence, and *not* to the *other*, who afterwards comes before him, the other half of that slave would stand emancipated; but if the master intended it to apply to the other slave, who last came before him, the other half of the *stationary* slave (who continued in his presence) would not be emancipated; the half of emancipation is therefore divided: consequently, *one fourth* of him becomes emancipated, in virtue of the *second* address; and as *an half* has been already emancipated, in consequence of the *first* address, it follows that three fourths are emancipated in all: and of the slave comprehended in the second address *one half* only is emancipated. *Mohammed* says (with respect to the *first* slave) that the second address affects equally, and is, in its consequence, *divided* between him and the *stationary* slave; and as the latter is emancipated by it in *one fourth* only, it follows that the *third* slave is so likewise. But the two *Elders* say that as the second address comprehends both slaves, and consequently requires that it be equally divided between them, it follows that the half of each should thence become emancipated: but a *fourth* of the stationary slave remains unliberated, because he is already entitled to freedom with respect to *one half*, in

virtue of the master's *first* declaration, (as already stated;) whereas the *third* slave had, as yet, obtained no such right, and of course becomes released in *one half*.—Observe, that if the master should emancipate his slaves in the manner here recited, *upon his deathbed*, and die possessed of no other effects excepting those three slaves, then *one third* of the three is to be distributed among them, agreeable to the principles already laid down;—that is, the whole number of lots (or *equal portions* of *manumission*) is to be added together; and this (according to the decision of *Haneefa* and *Aboo Yoosaf*) amounts to *seven*, because the bondage of each slave must be divided into *four portions*, on account of the *three fourths*, (it having been said that the stationary slave stands emancipated in *three fourths*, and each of the others in *two fourths*;) hence the whole amounts to seven *lots*, or *equal portions*:—now manumission granted upon a deathbed is a species of *bequest*,—and *bequest* holds good only to the amount of *one third* of the property of the testator;—hence it is necessary, in the present instance, that the portions of the *heirs* should be computed at *twice* the amount of the portions of *manumission*; the bondage of each slave, therefore, is divided into *seven* portions, and consequently the whole property makes *twenty-one* portions; hence the *stationary* slave remains emancipated in *three* portions out of *seven*, and for the remaining *four* he must perform labour to the heirs;—and of each of the others *two sevenths* is emancipated, and each must perform labour for the *five* remaining *sevenths*. Upon due examination it will appear that by this computation *one third* will go to the *slaves*, and *two thirds* to the *heirs*, without injury to the essential rights of either.—But if this computation be made according to the decision of *Imâm Mohammed*, the bondage of each slave must be divided into *six* equal portions; because (according to *him*) there is released, in the *third* slave, only *one* portion, namely, a *fourth*, which, with *two fourths* released of *one*, and *three fourths* of *another*, makes in all *six fourths*; and these multiplied by *three* (the number of slaves), give *eighteen equal parts*, six of which remain emancipated; thus—of the *stationary* slave *three* portions become released, and he must perform

perform labour for the remaining three;—of him who had stood along with him, during the master's first address, *two* portions are released, and he must perform labour for the remaining four portions;—and of the *third* slave one portion is liberated, and he must perform labour for the remaining *five* portions.

IF a master should say to his two slaves “*one* of you is free,” and he afterwards *sell* one of those two, or if one of them *die*, or the master constitute one of them a *Modabbir*, the remaining slave then becomes *free*;—and if the master should explain, saying “my intention “regarded *the other*,” still his declaration is not to be credited, because, as a *declaration* of manumission is *manumission* in *one* shape, it is a condition [of credibility] that the object of such declaration be, at the time of making it, a proper subject of manumission in *every* respect;—now the slave who is sold remains no longer a subject of manumission to the *seller*; and he who dies does not remain a subject of manumission in *any* shape; neither is a *Modabbir* a subject of *complete* manumission, as he is constituted a claimant to that privilege on the event of his master's death;—the remaining slave is therefore to be considered as the person upon whom the master's declaration takes effect: moreover, from his selling *one* of the slaves, it is apparent that the sole intention of the master, with respect to *him*, was *the acquisition of profit*,—or, from his constituting one of them a *Modabbir*, it is evident that his sole intention, with respect to *him*, is that *he shall remain in his possession, to enjoy the use of him, until his death*; and as either of these circumstances is repugnant to *manumission*, (to the granting of which the master has bound himself by his declaration,) it is to be considered as applying to the remaining slave by construction.—And in the same manner, if a master should say to two of his female slaves “*one* of “you is *free*,” and he afterwards make one of them an *Am-Walid*, then the other female slave becomes emancipated, for the reasons above stated.—It is to be observed that what is now advanced—“and “should afterwards *sell* one of these two,”—is *general*; that is to say,

Case of
emancipation
of one of two
slaves un-
speci-
fied.

a *valid* sale and an *invalid* sale, a sale *with* seizin and a sale *without* seizin, a sale *with* a condition of option, and a sale *without* a condition of option,—are all alike, as the arguments adduced equally apply to all these cases.—It is further recorded, as an opinion of *Abou Yoosaf*, that the exposure of the slave for sale falls under the same rule as *actual sale*; and also, that the disposal of him by *free gift* or *alms* (with *delivery* and *seizin*) is the same as by *sale*;—all those affording proof that the declaration of the master was intended to effect the freedom of the *other* slave, as much as the *actual sale*.

Case of indefinite emancipation of *one* of *two* female slaves.

IF a man, addressing himself to his two *female* slaves, should say “*one* of you is *free*,” and afterwards have carnal connexion with one of them, yet the other is not emancipated, according to *Haneefa*.—The two disciples hold that the other thereupon stands emancipated, because the act of coition is not lawful but in a *property*; and *one* of the *two* is *free*:—now the commission of the act with *one* of them evinces that the master still considers *her* as his property; and hence it is manifest that the *other* is emancipated: and decrees pass accordingly. *Haneefa* argues that the master’s right of property in the slave with whom he has carnal connexion still remains, since he emancipated a slave *undefined*, whereas she is *specified*, and the carnal use of her is lawful to him, so that his connexion with her does not afford any proof of manumission taking place; on which ground it is that *Haneefa* holds the carnal use of both to be lawful to the master.—The foundation of this is, that the manumission of *one* of *two* slaves does not take place until definition be obtained, whence it resembles *Ittak* suspended upon a condition, (as *this*, when pronounced in behalf of a slave *undefined*, remains suspended upon *definition*;) and consequently, until such definition takes place, the master is at liberty to have carnal connexion with both his female slaves. But decrees are not passed upon this principle.

IF

If a man say to his female slave "if the first child you bring forth be a *son*, you are *free*," and she afterwards brings forth twins, a *boy* and a *girl*, and it be not known which of them was first born, in this case the mother and the daughter become emancipated in *one half* each; but the *son* is not freed at all; because there are two circumstances by which the mother and daughter are liable to be respectively affected;—under *one* they become emancipated *in toto*, and under the *other* they remain *in toto* in bondage;—in other words, they would *both* become free, supposing the *boy* to have been born first, (the *mother*, by the occurrence of the condition, and the *daughter*, as a dependant of her mother, who is free on the instant of the boy's birth,) and neither of them would be in any respect emancipated, supposing the daughter to have been first born, for in this case the condition of manumission would not exist; the *half* of the mother and daughter is therefore emancipated, and they are respectively to perform labour for the remaining *half*; but the son, not being in any respect liberated, continues a slave. If the mother should make a declaration (during the daughter's nonage) pleading that the *son* was born first, and the master deny this, his assertion, delivered upon oath, must be credited, because he denies the occurrence of the *condition* of manumission, and if a defendant swear, and the plaintiff be destitute of *proof*, his plea is defeated: but if the master *refuse* to make oath, the mother and daughter become emancipated, because, if the mother were to claim her *daughter's* freedom only, her claim would be credited, as her *daughter's* advantage only appears to be consulted; and the master's refusal to swear is to be taken as an acknowledgment of the freedom both of *mother* and *daughter*, whence they are both emancipated. But if the daughter become an *adult* without advancing any claim on her own behalf, and the case, in every other respect, be the same as before stated, then the *mother alone* stands emancipated by the master's refusal to swear, and not the *daughter*; because the claim of a mother for the freedom of an adult daughter is not admitted with respect to such daughter; and the effect of a refusal on the part of a defendant to swear, depends

Case of manumission of a female slave conditional upon her bearing a *son*.

Evidence concerning an Indian manumission of a female slave not admitted.

upon the validity of [the claim advanced against him; the refusal of the master, therefore, in the present case, in no respect affects the *daughter*.—If, on the other hand, the adult daughter were to plead, in her own behalf, that “her mother had been first delivered of a *son*,” and the mother remain silent, in this case the emancipation of the *daughter alone* is established by the master’s refusal to swear, and not that of the *mother*, as her claim in behalf of her mother is *invalid*, and upon its *validity* depends the effect of the master refusing to swear, as before observed.

Evidence concerning an indiscriminate manumission of male slaves not admissible,

IF two *witnesses* bear testimony concerning a person, “that he has emancipated one of two male slaves,” such testimony is void, (according to *Haneefa*,) unless it relate to a *bequest**:—contrary to evidence in *divorce*, for if two witnesses were to bear testimony that such a man had divorced *one* of *two* wives, this testimony is admissible, and the husband may be compelled to specify which of his wives he had divorced.—This last is universally admitted; and the two disciples maintain that the case of manumission is subject to the same rule.—The origin of this difference of opinion between our doctors, is that *Haneefa* holds evidence to the emancipation of a *male* slave to be inadmissible, without a claim being entered by the slave himself;—whereas the two disciples hold that it is admissible, independant of such claim, in the same manner as evidence to the divorce of a wife, or the manumission of a *female* slave, which is admitted without any claim being advanced,—as is universally known and allowed.—Now the claim of a *male* slave being held, by *Haneefa*, to be essential to the admission of evidence to his emancipation, and this essential condition not existing in the case here treated of, (since no claim can proceed from an *unknown* person,) it follows (according to his tenet) that the evidence of witnesses thereto cannot be admitted:—with the two disciples, on the contrary, the claim of a male slave not being held essential to the admission of evidence to his emancipation, it follows (according to their tenet) that the testimony of the witnesses, in the case in question,

* That is, to a sentence of emancipation pronounced upon a deathbed.

is to be admitted, although no claim be advanced by the slave. It is to be considered, that in the case of *divorce* the nonexistence of a claim is in no respect prejudicial to the testimony of witnesses, as *claim* is not a *condition* in that case.

IF two witnesses bear testimony concerning a person that he has emancipated *one* of *two* female slaves, their testimony is not admitted, by *Haneefa*, although *claim* be not a condition of the admission of evidence respecting the emancipation of female slaves; for the reason why *claim* is not a condition, is that the manumission of a *female* slave comprehends the prohibition of her person, and on this account resembles *divorce*; but here the manumission is *indefinite*; and *indefinite* manumission does not occasion prohibition of the person, (in the opinion of *Haneefa*,) as was already stated; wherefore the testimony in this case stands the same as that given respecting the emancipation of *one* of *two* male slaves.

ALL that has been here advanced relates to evidence respecting the manumission of one of two slaves by their master whilst *in health*;—but where it relates to a manumission of this description *upon a deathbed*,—or, where two witnesses testify that a master had constituted *one* of *two* slaves a *Modabbir*, (whether in *sickness* or in *health*,) their testimony is valid, according to a favourable construction of the law, whether it be given during the illness of the master, or after his death. The reasons for a favourable construction of the law on this occasion are twofold;—FIRST, *Tadbeer* is a species of *bequest*, under whatever circumstances it may be granted;—and, in the same manner, manumission is a species of *bequest*, when granted *upon a deathbed*; and the claimant in a cause respecting a bequest is the *testator**, who is known, and a representative of whom exists in the person of his *heir* or execu-

unless it relate to a deathbed manumission.

* All claims of this nature are made, not in the name of the *legatee* or the *executor*, but of the *testator himself*, who is still supposed by the law to exist in his *representatives*.

tor;—SECONDLY, after the death of the master the manumission pronounced by him with respect to *one* of *two* slaves unspecified, is partaken of by *both*, and hence *each* becomes a specific claimant in his own behalf.

Case of *post-*
obit evidence
to an indis-
criminate ma-
numission
granted dur-
ing *health*.

IF, after the death of a person possessed of slaves, two witnesses bear testimony that he, [the deceased,] whilst he was in health, had said to two of his slaves “one of you is emancipated!” there is in this case a difference of opinion:—some maintain that their testimony is not to be admitted, as the manumission now under consideration does not fall under the description of *bequest*,—whilst others contend that their testimony is to be admitted, as the manumission aforesaid, after the death of the pronouncer, extends equally to both slaves, and hence each becomes a specific claimant in his own behalf.

CHAP. IV.

Of Manumission by *Hilf*, or *Vow*.

Definition of
Hilf.

BY *Hilf* is understood a *condition* and a *penalty*;—as if a man were to say “if I enter the house of such a person, such an one my slave is “free.”—This is also termed *Yameen* *.

The effect of
a manumif-

IF a man say “whenever I enter such an house, then whatever

* See articles *Yameen* and *Eimán*.

“ slave

“ slave may *on that day* be in my possession is *free*,” and it should happen that the person thus declaring is not, at the period of speaking, possessed of a single slave, but afterwards purchase one, and after that enter the beforementioned house, this slave becomes free, because the intention of the speaker in the words “ *on that day*,” applies to the day on which he should enter the said house, on which day the said slave is in his possession; and this is the condition. On this account, therefore, *any* slave who might be in his possession, at the time of his speaking as above, is free, provided such slave should be still remaining in his possession at the time when the event upon which manumission was suspended takes place. But if the person should not introduce the words “ *on that day*” in his speech, but should say “ whenever I “ enter such a house, my slave or slaves are free,” in such case any slave whom he may have purchased after such declaration is not emancipated, because the speech, as here expressed, is confined in its effect to the slave or slaves in the possession of the speaker at the period of his declaration, and whose emancipation is suspended upon the circumstance of his entering the house; they only therefore are liberated upon that event taking place,—*provided they still continue in the speaker’s possession*;—and the sentence does not extend to any who may have been purchased *posterior* to the time of speaking.

tion by vow
depends upon
the manner
in which it is
expressed.

If a man should declare “ whatever slave of mine is a *male*, the “ same is free,” and he should, at the time of speaking, be possessed of a pregnant female slave, who is afterwards delivered of a male child, yet this male child is *not* free.—This consequence evidently follows, where the female slave does not bring forth her male child within less than six months after the master’s declaration, because the words above recited point only to such slaves as may be then in the speaker’s possession at the time of his speaking; and it is probable that the pregnancy of the female slave has not, at that period, taken place, because here the smallest term of pregnancy is *posterior* to the declaration:—and the rule is the same where the female slave brings forth a

son within *less* than six months after the declaration, because the term “*slave*” applies to one who is a *subdued* slave, and an embryo is not a *subdued* slave, as it is a slave merely as a dependancy of the father. A *fœtus*, moreover, stands as a member of the mother, and the term *slave* applies to the *whole person*, and not to a *member* of it, and hence it is that the owner of a female slave cannot separately dispose of the *fœtus* or *embryo* with which she may be pregnant. Our author observes that the use of restricting the term *slaves* particularly to those of a *male* description, is that if a man were to speak *without* such restriction, saying “every one of my slaves is free,” his words would extend to his *female* slaves also, and consequently to the children with which they may be pregnant.

If a person say “every slave of which I am possessed shall become free *to-morrow*,”—or, “every slave of mine shall become released *the day after to-morrow*,”—and it should happen that, at the time of this declaration, he is possessed of *one slave only*, and he in the interim purchase *another*, and the day mentioned arrive, the slave of whom he was possessed at the period of speaking is emancipated, but not the other whom he had purchased in the interim, because the above sentence does not apply to any except the *former*.

Vow of manumission referred to the decease of the vower.

If a person should say “every slave of whom I am possessed, (or, “*every one of my slaves*) shall become free at my death,” and it should happen that, at the time of so speaking, he is possessed of *one slave only*, and he afterwards purchase another,—the *first* slave is a *Modâbbir*, but not the *second**; but in the event of the owner’s *death*, both slaves become emancipated from the third of his property. *Abou Yoosaf* has delivered an opinion in the *Nawâdir* that the first slave is a *Modâbbir*, but not the *second* in any respect †: and the same difference of

* The difference between the two is that the *former* is no longer transferable by sale or otherwise, but the *latter* remains so transferable until the owner’s decease.

† That is to say, the second slave is neither constituted a *Modâbbir* at the time of purchase, nor does he (like a *Modâbbir*) become free upon the master’s decease.

opinion subsists, where the master says “every slave of mine, when I die, is free.”—The argument of *Abou Yoosaf* is that the sentences here recited relate solely to *the time present*, for which reason the slave of whom the master became possessed posterior to his declaration is in no respect affected by it; wherefore this slave is not emancipated; and consequently the *first* slave is a *Modabbir*, but not the *second*.—The argument of *Haneefa* and *Mohammed* is that the words here recited are a declaration of manumission, and also a bequest, (whence it is that the manumission of a *Modabbir* takes place from the third of the property of the deceased;—now, in bequest, respect is had to *two periods*, namely, the *actual time* of bequest, and also *that which intervenes*, from the date of the bequest to the testator’s decease; (whence it is that in a bequest the property acquired by the testator after the date of the will is also included,—and, in the same manner, any child born after the date is included in a will in favour of the children of a particular person:—in short, these sentences may be considered in two points of view; first, as a declaration of manumission; secondly, as a bequest:—taking them in the *first* sense, they apply to the slave who is in the person’s possession at the time of speaking, who is consequently a *Modabbir*, and therefore cannot be lawfully disposed of by *sale* or *otherwise*; and taking them in the *second* acceptation, they apply also to the slave subsequently purchased, but under the condition that he be remaining in the proprietor’s possession at the time of his decease.—The foundation of this is, that supposing the master had said, upon his deathbed, “every one of my slaves is free,” if, before his decease, he were to sell one whom he had purchased subsequent to so saying, the sale is lawful; but it would be otherwise if he were to say “every one of my slaves is free *the day after to-morrow*,” and afterwards purchase a slave, for the slave does not, on the *morrow*, become emancipated, as he is not included in the aforesaid sentence, since this is not in any view a bequest, but merely a sentence of emancipation.

CHAP. V.

Of Manumission for a Compensation.

A master proposing to release his slave for a certain sum, occasions emancipation upon the instant of the slave's assent.

IF a man say to his slave "you are free for four thousand *Dirms*," the slave is free immediately upon consenting to the proposal, and before the payment of the sum mentioned,—because the proposal of the master and consent of the slave is a compact of exchange of property for that which is not property, since the slave cannot be said to become possessed of himself by it; and, in *exchange*, it is necessary that its *effect* (which in the present instance is *freedom*) be established upon the slave's consenting to the return,—as in a case of *sale*, where the property of the thing bought is established in the purchaser upon his consenting thereto.—If, therefore, the slave consent, he is *free*, and the compensation is a debt upon his person; and this is a regular debt, whence bail may be taken for it: contrary to the case of a stipulated *Kitabat*, or ransom, which not being considered as a regular debt on the part of the *Mokâtib*, is notailable, according to what is mentioned on that head in the book of *Bail*.

A slave may be emancipated in return for property of any description.

THE property in return for which a slave is emancipated is *general*, and extends to all descriptions of property, whether *cash*, *household goods*, or *cattle*,—and manumission in lieu of any of these is approved, although the article be unspecified, because the manumission of a slave in return for property, is an exchange of *property* for that which is *not* property, in the same manner as *marriage*, or *divorce for a compensation*, or *composition for blood wilfully shed*, in all which the mention of the animal suffices, without identical specification. Manumission is also

also in the same manner approved in lieu of all articles of weight or measurement of capacity, provided the *kind* be made known, as *wheat*, for instance, by a man saying to his slave “ I will emancipate you for “ an hundred bushels of *wheat*,”—where the mention of the *grain* is approved, although its *quality*, whether *good* or *bad*, be unknown, because ignorance of the *quality* is comparatively of small importance.

If a person suspend the manumission of a slave upon the payment of *money*, by saying to him “ if you pay me one thousand *Dirms*, you are *free*,” the slave forthwith becomes a *Mazoon*, and is *free* upon producing to his master the above sum; but he is not a *Mokâtib*. His freedom is an evident consequence of his payment of the sum mentioned, as the master has suspended it upon that circumstance; and he becomes a *Mazoon*, because the master, by the tenor of his declaration, excites him to the acquisition of property, by the demanding of property from him, which implies that having acquired it by industry, he is to pay it to him, and *not* that he is to procure it by *begging* for that purpose. The slave is therefore a *Mazoon*, because the master’s demanding property of him argues his being so. And if the slave should offer, or make a tender of, the sum mentioned to his master, the magistrate may compel him to accept of it, and the slave becomes free.—The reason for compelling the master to accept of the money is that he is considered to be virtually seized of it, where the slave lays it before him, and leaves it, without giving any obstruction to his taking it; and by the *compulsion* here mentioned is meant *imprisonment*, to wit, that *he must either accept the money, or be imprisoned by the magistrate*.—Ziffer says that the master cannot be compelled to take the money; and this is conformable to analogy, because the master’s declaration amounts to a *Yameen*, or *conditional vow*, since he has expressly suspended freedom upon the condition there mentioned, whence it is that it does not depend upon the slave’s consent, and is not conceived liable to annulment: now no compulsion is admitted re-

If the master suspend the freedom of his slave upon the payment of a sum of money, the slave is rendered a *Mazoon* upon the instant, and becomes free upon payment of the money,

which the master may be compelled to accept.

specting

pecting the completion of the condition of a vow, as the claim of any person (depending upon that) is not established until the condition shall have taken place: contrary to contracts of *Kitâbat*, as those are contracts of *exchange*, in which the return is due, whence it is that the master of a slave may be compelled to accept of the return of *Kitâbat*, (that is, of *the ransom*.)—The argument of our doctors is that the master's declaration is a suspension of emancipation in respect to his *words*, and an exchange in respect to his *design*; for he has suspended emancipation upon the payment of a sum, solely with a view to induce the slave to pay it to him, in order that he [the slave] may be free, and that he [the master] may thence obtain property, as in a contract of *Kitâbat*;—and hence it is that where a man says to his wife “you are divorced if you pay me one thousand *Dirms*,” these thousand are the return for divorce, and consequently, when the woman pays them to him, a divorce irreverfible takes place upon her, and ſhe becomes completely repudiated.—In ſhort, the maſter's declaration is in this caſe a ſuſpenſion of *emancipation* with reſpect to his *words*, and an *exchange* with reſpect to his *design*; we therefore conſider it as a ſuſpenſion in its *commencement*, both as this form accords with practice, and alſo becauſe ſuch an interpretation of it guards the maſter againſt an inconvenience, ſince, conſidering it in the light of a ſuſpenſion, it remains in the maſter's power to diſpoſe of the ſlave by ſale or otherwiſe, until ſuch time as the money is paid; and the *ſlave* is not the proprietor of his own acquiſitions, but the *maſter*; and his freedom does not extend to a child born to him *before* he makes payment of the money: and we conſider it as an exchange in its *completion*, (that is, when the ſlave pays the money,) in order to guard the ſlave againſt an inconvenience; for when conſidered as an exchange in its *completion*, the maſter may be compelled to accept of the money upon the ſlave offering it to him.—And in the ſame manner, if the ſlave ſhould produce and make a tender of *a part* only of the ſum mentioned, the maſter may be conſtrained to accept of it, but the ſlave is not free ſo long as he does not pay the whole ſum, becauſe the condition

condition of emancipation is not fulfilled by the payment of a *part* only; and hence, if the master were to remit a part of the sum mentioned, and the slave to pay the remainder, yet he does not become free, as the condition is not fulfilled.—If, moreover, the slave pay his master the sum mentioned, which he had acquired *previous* to the said suspension, he is *free*, as the condition is in that case fulfilled; but yet the master still has a claim upon him for that sum, because the money thus given is already the master's right; but if the slave pay his master the *said* sum, having acquired it *subsequent* to the suspension, the master in this case has no further claim upon him, as he is empowered, from his master, to pay him the money out of his acquisitions made subsequent to suspension.—It is to be observed, however, that as the suspension is a *Takhyeer*, or *proposal of option*, it is restricted to the assembly or company in which it was spoken, where, if the slave pay the money, he becomes *free*, but if not, after the rising of the assembly, it is of no effect.—But if the master were to say to his slave “*when-ever* you pay me one thousand *Dirms*, you are *free*,” this suspension is not restricted to that particular place or company, the term “*when-ever*” being general in its application.

IF a man say to his slave “you are free, *upon my death*, for one thousand *Dirms*,” and the slave agree *after the death* of his master, this his consent is approved, because the master had referred the declaration of freedom to the period immediately succeeding his death, and hence it is the same as if he had said to his slave “you are free *to-morrow* for one thousand *Dirms*,”—in which case the slave's consent, declared on the morrow, would be valid, and so on this occasion likewise.—This, however, is contrary to a case where a master says to his slave “you are a *Modabbir* for a thousand *Dirms*,” because there consent is requisite upon the spot, as that is a proposal of *Tadbeer*; but the sum mentioned is not *immediately* due, because the *Modabbir* remains in bondage in the interim.—The learned have remarked that the slave to whom his master says “you are free upon my death, for one

Case of a proposal of freedom for a compensation referred to the master's death.

“one thousand *Dirms*,” is not emancipated if he should postpone his acceptance of the master’s proposal until after his death, because upon that event he falls into the possession of the *heirs*, and hence cannot be liberated so long as those refuse to emancipate him, a *dead* person not being competent to grant manumission; and this is approved.

Case of a proposal of freedom for a specified service.

If a man liberate his slave for a service of four years, by saying “you are free if you perform service to me for the space of four years,” and the slave assent, he becomes free immediately upon signifying the same; and should the master, or the slave, at that time happen to *die*, there remains due from the slave, or from his effects, to the master, or to his heirs, (as the case may be,) the amount of the estimated price or value of such slave, in the same manner as if he had been a *Mazoon*, licenced to trade, and possessed of property therein acquired.—This is the doctrine of *Haneefa* and *Aboo Yoosaf*.—*Imâm Mobammed* says that the value of four years service only is incumbent upon the slave; for the reason of the slave becoming emancipated is that the master has made service for a certain space of time the return for liberty to the slave, whose emancipation is therefore suspended on his consent; and this consent is in effect given:—the slave therefore becomes liberated on the instant of expressing his consent; and the four years service are incumbent upon him, as service is capable of being a return, and consequently it is the same as if a master were to emancipate his slave for a return of a thousand *Dirms*, and the slave to consent, and the master to die upon the instant.—The difference of opinion between the two *Elders* and *Imâm Mobammed* on the point, whether the full value of the *slave*, or the value of *four years of his service* only remains due from him, originates in the diversity of their opinion, in another case, which is as follows:—if a master should sell his slave into the hands of that slave*, in lieu of a female slave, and the said

* *Sic in orig.*—There is an apparent singularity in this expression; it means, however, nothing more than the master offering to emancipate his slave (that is, to sell him to *himself*) in return for a female slave.

female

female slave happen, on the instant, to die, the master has a claim upon the male slave for the value of his person, according to the two *Elders*; but, according to *Imâm Mohammed*, for the value of the *female slave only*. This is a case well known*; and the reason for founding the other case upon it is, that, as the delivery of the female slave, in the *one* instance, is rendered impossible by her decease, so is that of four years service from the slave, in the *other*, by *his own* decease; and in like manner by that of his master; wherefore these are correspondent cases.

IF a man should say to another “emancipate your female slave for one hundred *Dirms*, for which I shall be responsible, on condition that you marry her to me,” and the person thus addressed should comply, and the said female slave, after liberation, refuse to be married to this man, she is in this case free, and nothing is incumbent upon the person who required her freedom as aforesaid; because, if one man were to say to another “emancipate such an one, your slave, for one thousand *Dirms*, for which I will be accountable,” and the owner of the slave emancipate him accordingly, the slave is emancipated on the part of the owner, but the man who thus proposed for his freedom is not accountable for any thing; and so likewise in the present case: contrary to a case where a man says to another “divorce your wife in return for one thousand *Dirms*, for which I will be answerable,” and the man divorces his wife accordingly; for in that case the thousand *Dirms* are due from that person; because the stipulating of a return for *divorce*, with a stranger, is lawful; but to stipulate a return for *emancipation*, with a stranger, is not lawful.—The nature of this has already been explained in treating of *Khoola*, or *divorce for a compensation*.

Case of a female slave emancipated for a compensation paid by a stranger.

* Meaning, perhaps, a *common* case, or a case much adduced in *casuistry*.

Another case
of the same
nature.

IF a man say to another “emancipate your female slave *on my behalf* for a return of one thousand *Dirms*, provided you marry her “to me,” and the master comply, and the woman, after emancipation, object to the marriage, in this case the thousand *Dirms* is divided into two parts, the *value of the slave*, and her *proper dower*, and that portion which appears to agree with her *estimated value* must be paid by the proposer to the emancipator, but that which answers to the *proper dower* is not due.—The reason of this is that the man’s saying “emancipate her *on my behalf*,” amounts to a *purchase* of her, as much as if he had said to the master “*sell* your female slave into “my hands first, and then *emancipate* her, on my behalf, and marry “her to me,”—and such being the case, he opposes the thousand *Dirms* to two things,—*first*, to the woman’s person as a *slave*, on account of the purchase; and, *secondly*, to her person as a *wife*, on account of marriage*. The thousand *Dirms* is therefore allotted between both; and there is due from the man the consideration for that which is delivered into his hands, namely, *her person* as a *slave*; and the consideration for that which was his object, (namely, her person as a *wife*,) is remitted.—If the slave should not *object* to the marriage, but *consent* to it, the law in this case is not mentioned by *Mohammed*: but yet here it is a rule that, whatever the consideration for the value of the slave may be, it is remitted in the *former* instance, (namely, where the proposer does not use the expression “*on my behalf*;)” but, in the *second* instance, (where this expression is introduced,) the proportion allotted † for her *value* goes to her owner: and the proportion allotted for her *proper dower* goes to the slave in both instances.

* *Arab*.—“To the woman’s *neck* on account of *purchase*, and to her *Booza* [*genitale mulieris*] on account of *marriage*.”—The translator adopts the above mode of expression, as being less *uncouth*.

† Out of the thousand *Dirms*.

CHAP. VI.

Of *Tadbeer*, or *post obit Manumission*.

TADBEER, in its primitive sense, signifies *looking forward to the event of a business*:—in the language of the LAW, it means a declaration of a freedom to be established after the master's death. Definition of the term.

IF a man should say to his slave “when I die, be free,”—or “you are free upon my decease,”—or “you are a *Modábbir*,”—or “I have rendered you a *Modábbir*,”—in all these cases the slave becomes a *Modábbir*, because all these modes of address expressly signify *Tadbeer*. Form of *Tadbeer*.

IT is unlawful to dispose of, or to transfer, a *Modábbir*, either by sale or gift: in short, it is not lawful for the proprietor to put him out of his own possession in any shape whatever, except by manumission, as is the rule respecting *Mokâtibs*.—*Shafëi* maintains that the sale and gift of a *Modábbir* are both lawful, because *Tadbeer* is merely a suspension of the freedom of a slave upon a particular condition, (namely, the master's death,) whence no obstacle can arise to the gift or the sale,—as is the rule in all other cases of suspension upon a condition, (which rule, moreover, holds with respect to a *restricted Tadbeer* *;) and also, because *Tadbeer* is a species of bequest; and bequest is not preventive of gift or sale.—The arguments of our doctors are twofold;—FIRST, the words of the prophet, “MODÂBBIRS shall neither A *Modábbir* cannot be transferred.

* That is, when a man says to his slave “you are free, *if I die within such a time*.”

“ *be sold, nor given away, nor inherited, but are to be emancipated from the third of the master’s property:*”—SECONDLY, *Tadbeer* is the occasion of freedom to the *Modabbir*, as he is free upon his master’s decease; and *Tadbeer* is the sole reason for his being so.—It is to be observed that, although *Tadbeer* be a suspension of manumission upon the master’s death, yet its efficiency for producing the freedom of the *Modabbir* is established upon the instant, and it is not to be considered as becoming the cause thereof *after the master’s decease*, since constituting it a cause upon the instant is preferable, as *Tadbeer* now exists, whereas after the death of the master it is nonexistent, because *Tadbeer* is merely a *speech*, and a *speech* is a *declaration*, and that is not of a *permanent* nature, (according to what appears in the *Elm-al-Kalâm* *;)—and also, because its efficiency cannot possibly be postponed to a time subsequent to the master’s decease, since the master’s competency is then no more. This is evidently contrary to suspensions of any *other* nature, for in these the obstacle to the efficiency exists *before* the condition takes place, as suspension is a *Yameen*; (and *Yameen* opposes the existence of the condition, since the design of *Yameen* is to prevent that†, and of course to prevent its consequence, and this it is which opposes the taking place of a suspended *divorce* or *emancipation*;) and the postponement of the efficiency to a time posterior to the existence of the condition is in such instances possible, as the competency of the acting party still remains. Thus, between *Tadbeer* and other modes of suspension there is an evident difference. Moreover, *Tadbeer* is a bequest, and bequest conveys a right to eventual possession, on the instant, in the same manner as inheritance; and as it appears that *Tadbeer* is an *instantly established* cause of *eventual* freedom to the *Modabbir*, and the abolition of a cause is illegal, it follows that the *sale* or *gift* is illegal, as these would induce an abolition of the cause.

* A treatise on *rhetoric*, so called.

† Vide definition of *Yameen*. Book VI. Chap. I.

IT is lawful for a master to require any service of his *Modábbir*, and also to hire him; and if the *Modábbir* be a *female* it is lawful for him to cohabit with her, or to contract her in marriage to any person, because the property of a master in his male or female *Modábbir* remains unshaken, and on this account all the said acts are lawful to him; nor is there any thing to prohibit or prevent him from the exercise of those acts, so long as his property continues.

Power of a master over his *Modábbir*.

A *MODÁBBIR*, on the decease of his master, is made free, from the third of his property, because of the tradition before quoted; and also, because *Tadbeer* is a species of bequest, as being a gratuitous act, referred to a time posterior to death.—And if he [the master] be possessed of no other property than this *Modábbir*, he [the *Modábbir*] must perform emancipatory labour to his master's heirs for two thirds of his estimated value, provided the master be not involved in debt: but, if he die insolvent, the *Modábbir* must in that case perform such labour for his whole value, because the discharge of debts precedes the payment of bequests; and, as the emancipation of the *Modábbir* cannot be *annulled*, his value is to be received in this mode.

The *Modábbir* becomes free upon his master's decease.

THAT the child born of a female *Modábbir* becomes a *Modábbir*, is allowed by all the companions.

A child born of a *Modábbir* is a *Modábbir*.

IF a man constitute his slave a *Modábbir*, by a *restricted Tadbeer*, by saying to him “if I die of this disease, you are free,”—or “if I should die *upon this journey*, &c.”—or “*of such a disease*,”—or “*upon such a journey*,”—such slave becomes a *Modábbir Mokáyed*, or *restricted Modábbir*, whom it still continues lawful to dispose of by sale or otherwise, because a *restricted Tadbeer* has no instant operation in establishing the freedom of the slave, on account of the uncertainty and suspense respecting the *manner* or *time* to which the *Tadbeer* is restricted:—contrary to an *unrestricted Modábbir*, as his freedom is suspended.

A *restricted Modábbir* may be sold, or otherwise transferred.

pended upon the death of the master, *when* or *howsoever* that may happen; and death is *inevitable*.—If, however, the master should die in the manner, or within the time, described by him in his declaration, the *Modábbir* becomes free, in the same manner as an *unrestricted Modábbir*, (that is, from the third of the master's property,) because in this case the effect of the *Tadbeer* in question is established upon the last moment of the master's existence, since the *manner* is then certified; whence it is that the *Modábbir*'s freedom is considered as proceeding from the third of the master's property. Let it be remarked that it is a form of restricted *Tadbeer* for a master to say to his slave “if I die within *one year*,”—or, “within *twenty years*,”—you are free,” as his death within such a time is *dubious*:—contrary to where a man says to his slave “if I die within *one hundred years*, &c.” he being of such an age as affords no probability of his living to that period, for then the slave becomes an *unrestricted Modábbir*, because his decease within such a time is *inevitable*, and does not admit of doubt, being the same as if he had mentioned his death in general terms, without any restriction to the *time* or *manner* of it.

C H A P. VII.

Of *Isteelád*, or *Claim of Offspring*.

Definition of
the term.

ISTEELÂD signifies a man having a child born to him of a female slave, which he claims or acknowledges as of his own begetting; and the mother of such a child is termed an *Am-Walid*.

IF

IF a female slave bring forth a child begotten by her master or owner, she becomes forthwith an *Am-Walid**; and it is afterwards unlawful for her master to sell, or in any other manner to transfer or dispose of her, because the prophet has said, with respect to an *Am-Walid*, “*her child hath set her free*;”—and the prophet having thus ordained her freedom, one of its effects, namely, the illegality of disposal by sale or otherwise, undoubtedly becomes established;—and also, because a participation of blood has arisen between the *Am-Walid* and her master through means of their child, (according to what has been observed upon that subject in the book of *Marriage*, treating of *illegality by affinity*;) and, although this virtual participation of blood, as not being a cause of a very *cogent* or *forcible* nature, does not occasion the effect until after the master’s death, yet the right of claim founded upon it is established *on the instant*, and hence it is unlawful for the master to *sell* her, or in short to put her out of his own possession in any mode but by *emancipation*.

A female slave, bearing a child to her master, becomes his *Am-Walid*, who cannot be sold, and is free upon his decease:

IF one of two partners in a female slave make her an *Am-Walid*, she becomes his *Am-Walid in toto*, because *claim of offspring* does not admit of division, as that is a branch of *parentage*, and as *parentage* is indivisible, so likewise is every *branch* of it.

IT is lawful for a master to require service of his *Am-Walid*, or to hire her out to work, or to contract her in marriage, because an *Am-Walid* is the property of her owner, in the same manner as a *Modabbir*.

but her master may still require service of her.

THE parentage of a child born of a female slave is not established until the master shall have acknowledged and claimed it.—*Shafei* alleges that the parentage of the child is established in the master, although he should *not* claim it; because, as the parentage of a child born in marriage is established in virtue of the contract of marriage, although the husband lay no claim to it, it follows that the parentage

The parentage of a child born of a female slave is not established but by the master’s claim.

* *Anglicé*,—mother of a child.

of a child born of a slave, where her owner has had carnal connexion with her, is established *a fortiori*; the carnal act being a still surer ground for this than simple *marriage*, without any such connexion known or ascertained.—The argument of our doctors is that the design in holding carnal connection with a female slave is merely *the gratification of appetite*, and *not the procreation of children*, as, in consequence of a female slave bearing a child to her master, she is no longer an appreciable property, inasmuch that *sale*, and other acts of property, with respect to her are prohibited; and hence the simple circumstance of the master's having had carnal connexion with his female slave is not sufficient to establish the parentage of a child born of her, without his claiming it, any more than the circumstance of his being possessed of such female slave without this connexion: contrary to a *contract of marriage*, as the evident design of marriage is *progeny*, for which reason the husband's claim is not requisite to establish the parentage of a child born to him in *wedlock*.

The parentage of a child born of an *Am-Walid* is established in her master, unless he *deny* it.

IF a female slave become an *Am-Walid* to her master, in consequence of his claiming her child, and she afterwards bring forth *another* child, the parentage of the latter child is established in the master, independent of any claim on his part, because the woman, in consequence of his claiming the first child, becomes a partner of his bed, and stands as his *wife*:—but if the master were to *deny* the parentage of the second child, declaring it *not* to be *his*, the child's parentage is not to be established in him, because the *Am-Walid* is partner of his bed in an *inferior* degree, (whence it is lawful for her master to contract her in marriage to another person:)—contrary to a *wife*, the parentage of whose child is not disproved by her husband's denial, until he make an *asseveration**, because the wife is partner of his bed in a *superior* degree, whence it is that he cannot contract her in marriage to any other person.—What is now alleged relates merely to the decree of the ma-

* See Vol. I. Page 382.

gistrate:

gistrate: but in a *religious* view, if the master has had carnal connexion with his female slave, and has kept her from such connexion with *others*, and has not performed the act of *Azil** with her, it is incumbent upon him to acknowledge the child born of her, and to claim it as his own, because it is apparent that the child is his;—if, however, he have indulged in *Azil* with her, or have not kept her up, he may lawfully deny the child, as it is probable, in this case, that it may have been begotten upon the slave by some other person in *fornication*.—This is recorded from *Haneefa*.—*Aboo Yoosaf* alleges that, in case the master has had any carnal connexion with his female slave, it is laudable in him to claim the child born of her, whether he may have kept her up from connexion with others, or *not*, or whether he may have indulged in the act of *Azil* with her, or otherwise; because, having had carnal connexion with her, there exists a possibility that the child may be *his*; whence it behoves him not to deny it, on account of the *doubt*.—*Mohammed* says that if the master be not under a *conviction* that the child is his, no obligation rests upon him to claim it;—but yet that it is laudable in him to liberate the child, and that, enjoying the mother whilst he lives, he liberate her also, at his *death*, because the acknowledgment of any child, under any circumstance of doubt, is not incumbent: but it is nevertheless requisite to emancipate both the *child* and its *mother*, since, if this be not done, and it be possible that the child is *his*, a consequence would be induced of rendering a *free* person a *slave*, on a principle of *doubt*.

If a master contract his *Am-Walid* in marriage to any person, and she bring forth a child to her husband, such child is subject to the same law with his mother,—that is, becomes free upon the death of her master, and (like the mother) without any obligation of emancipatory labour,—because the right to eventual freedom, established in the mother, extends *through her* to the child, in the manner of a *Tadbeer*;

The child of an *Am-walid* is *free* upon the decease of the master.

* For an explanation of this, see book of *Marriage*, p. 167.

(whence it is that the child of a *free*-woman is *free*, and that of a *bond*-woman a *slave*;)—the *child*, therefore, becomes *free*, in the same manner as the *mother*; but the *parentage* of the child is established in the *husband* of the *Am-Walid*, and not in the *mother*, because she is the partner of her husband's bed *solely*, even though the marriage be invalid, as an *invalid* marriage stands as a *valid* one, with respect to all its *effects*.

Case of a child born of an *Am-walia* who is married.

IF a master contract his female slave in marriage to another person, and she bring forth a child to her husband, and the master afterwards claim the child, yet its parentage is not established in him, as the child is held, in *law*, to be the legitimate offspring of *another*; but yet, in virtue of such claim, the child becomes *free*, and the mother becomes an *Am-Walid* of her master in consequence of his acknowledgment.

An *Am-Walid*, upon the decease of her owner, becomes emancipated *in toto*.

WHEN the master of an *Am-Walid* dies, she becomes emancipated from his *whole* property, because it is recorded of the prophet that he ordained that *Am-Walids* should be *free*, and should not be sold on account of the owner's *debts*, nor be considered as, in any respect, included in his *Sils Maal**, as the desire of men to beget children is instinctive, and is therefore preferred to the right of heirs, in the same manner as a preference is given to the payment of the debts and funeral charges of the deceased: contrary to the case of *Tadbeer*, which is in the nature of a *bequest*, and not of an *instinctive desire*.—It is necessary to observe, that no emancipatory labour is incumbent upon an *Am-Walid* for the satisfaction of her deceased owner's creditors, because of the ordinance above recited,—and also, because an *Am-Walid* is not estimable property, (whence it is that if any person were to make a forcible seizure of an *Am-Walid*, and she to perish in the usurper's hands, he would not be responsible, according to *Haneefa*;)—the

* For an explanation of the phrases here used, see *Bequests*.

claims, therefore, of the owner's creditors, do not affect *her*:—contrary to a *Modabbir*, as he is held to be *estimable property*.

IF the *Am-Walid* of a *Christian* be converted to the *Mussulman* faith, she must perform emancipatory labour to her master for her *full value*, for she stands as a *Mokâtib*, and consequently does not become free until such time as she shall have paid her whole value by the performance of emancipatory labour.—*Ziffer* says that she becomes free *immediately*, the performance of emancipatory labour remaining as a *debt* against her. This difference of opinion subsists where the master is called upon to embrace the faith and refuses: but if he do *not* refuse, but embrace the faith, the *Am-Walid* continues attached to him as such, in the same manner as before, according to all the doctors.—The argument of *Ziffer* is that it is indispensably requisite to remove degradation from the *Am-Walid*, as she is now a *Mussulman*, and it is not lawful for her to continue any longer the slave of an *infidel*, and thereby remain in a state of *degradation*; and, as the removal of her degradation by purchasing her of the *infidel* is not practicable, it follows, of necessity, that she must become *free*.—The argument of our doctors, on the other hand, is that, in placing her in the same predicament with a *Mokâtib*, attention is paid to the interest of both parties, as in this case her degradation is done away by her becoming *free* with respect to *privileges* and *acquisitions*, in the same manner as a *Mokâtib*; and, by making her liberty depend upon her performance of *labour*, she in so doing indemnifies her master for her value, and under this idea it is to be expected that she will labour *diligently*, so as to become free; the master, therefore, is in this manner assured of a compensation for his property in her; whereas, if she were to become free upon the instant, (supposing her to be *poor*,) it is to be expected that she would be negligent in acquiring property, or performing labour, and this would be injurious to the master.

The *Am-Walid* of a *Christian* on becoming a convert, is free, after performing emancipatory labour.

OBJECTION.—The obligation of emancipatory labour upon the *Am-Walid* is not admissible, according to the tenets of *Haneefa*, for with *him* an *Am-Walid* is held not to be *estimable property*.

Q q q 2

REPLY.

REPLY.—The *Am-Walid* is *estimable property* in the faith of her master, who is a *Zimmee*, and we are enjoined to leave those to their own faith, and to act respecting them according to it.

—It is to be observed that if the master should die before the *Am-Walid* completes her mancipatory labour, she becomes free without the performance of it, because such is the rule respecting *Am-Walids*: and if she should become incapable of performing emancipatory labour during her master's life, yet she does not return into the state of an *absolute slave*; for if this were the case, it would follow that she again stands in the predicament of a *Mokátib*, as the reason for her so doing (namely, her *Islám*) still subsists.

Where a man obtains possession, as a slave, of a wife who has borne children to him, she becomes his *Am-Walid*.

If a man marry the female slave of another, and she bring forth a child to him, and he afterwards obtain possession of her as a *slave*, she forthwith becomes an *Am-Walid* to him.—*Shafëi* says that she does not become *Am-Walid* to him.—If, on the other hand, a man become possessed of a female slave—and make her an *Am-Walid*, and she afterwards appear to be the right of *another person*, and the aforesaid man again obtain possession of her, she becomes his *Am-Walid*, according to our doctors:—but *Shafëi* has two opinions upon the subject. In this case the child born of the slave is a *Walid Magroor**, and is therefore emancipated in return for his value, paid by the father to the person whose property she was discovered to be after he first became possessed of her.—The argument of *Shafëi* is that the slave had conceived the child at a time when she was the property of her master, and therefore cannot be the *Am-Walid* of the person aforesaid; (in the same manner as where a female slave becomes pregnant from fornication, and afterwards becomes the property of the fornicator, in which case she is not *Am-Walid* to him,)—upon this principle, that a slave cannot become *Am-Walid*, except where she brings forth a

* Literally, a child of a deceived person, for the father begat the child, whilst under a deception with respect to his right in the mother.

child who was free from the instant of conception, for the child is then a part of the *mother*, and a *part* cannot be opposed to the *whole*. The argument of our doctors is that the cause of the slave's becoming *Am-Walid* is *fazeeyât*, (or *participation of blood*,) as has been mentioned in treating of *marriage*: now *participation of blood* is established between the copulating parties, from the circumstance of the child's deriving existence, *in toto*, from each *respectively*; and as (in the case in question) the child's parentage is established, a participation of blood is established between the parties through the medium of the child:—contrary to a case of *whoredom*, as there the child's parentage is not established in the *fornicator*.

OBJECTION.—From this it would appear that, upon a fornicator becoming possessed of his bastard, as a slave, the bastard is not free, whereas a bastard is free in such a case.

REPLY.—The emancipation of the bastard, in this case, is on account of his partaking of the blood of the fornicator, *a certiori*, without any medium; but no participation of blood can subsist between a fornicator and fornicatress, except through the medium of their *bastard*; and he is not of established parentage.—Correspondent to this is the case of a man purchasing, as a slave, his *brother*, the bastard of his *father*,—for then the bastard brother does not become *free*, because the affinity of the bastard with the purchaser has no existence but through the medium of the father, and the parentage is not established in the father.

IF a man have carnal connexion with the bondmaid of his son, and she produce a child to him, and he claim it, the parentage of the child is established in him, and the mother becomes an *Am-Walid* to him, and he remains responsible to his son [her owner] for the amount of her estimated value:—but he will not have to account with him, either for her *Akir**, or for the value of the child which is born of her. This case, with the arguments upon it, are recited at large under the head

A man having a child by the slave of his son makes her his *Am-Walid*, and he must indemnify the son for her value.

* The portion due to a woman (in the manner of a *dower*) in a case of *erroneous* connexion.

of *marriage*.—The reason why the value of the child is not due is that it is free, *ab origine*, in the mother's womb, because the father had obtained a right in the female slave previous to carnal connexion, in the manner of succession *, wherefore the child appears to be a child of the *slave* by her *proprietor*.—But if a *grandfather* were to have connexion with the female slave of his *grandson*, the son [the father of the latter] being living, the parentage of the child born of her is not established in the *grandfather*, because he has no right or authority over the female slave during the existence of the intermediate relation.—If, however, this intermediate relation be not existing, the parentage is, in that case, established in the *grandfather*, as a *grandfather's* right over his *grandson's* property appears upon the demise of the *son*. And here it is to be observed that the *infidelity* or *bondage* of the father [the intermediate relation] is the same as his death, [in removing the bar to the grandfather's right of usufruct over his grandson's possessions,] since these two predicaments are of either of them terminative of authority in the same manner as *death*.

A claim of offspring advanced by one of two partners in a female slave establishes the parentage in him, and renders her his *Am-Walid*;

If a female slave, held between two men in partnership, bring forth a child, and one of the partners claim it, the parentage is established in that partner; because parentage being established in him, with respect of *one* half, in virtue of his moiety of right in the mother, the remainder is necessarily so, parentage not being capable of partition, as the cause thereof (namely, *conception*) can have proceeded from *one* father only: and the female slave becomes an *Am-Walid* to the said partner, because *claim of offspring* (in the opinion of the two disciples) is indivisible.—*Haneefa* contends that the female slave becomes *Am-Walid* in the share of the above partner only, who afterwards obtains possession of the share of the other partner, by paying him a compen-

* The father is, in virtue of his parental rights, invested with authority to the *use* of all his sons possessions, but not to the *destruction* of them; and hence it is that, having *destroyed* his sons property in his slave, by rendering her *Am-Walid*, he is made responsible to him for her value.

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sation, (as an *Am-Walid* is capable of being obtained as property,) and he is moreover responsible to his partner for an half *Akir*, as having held carnal connexion with a copartnership slave, which therefore appears to be committed *upon the property of another*. But he is not responsible for the value of the child, because the parentage is established in him from the instant of conception, and hence the other never had any authority of possession over it, so as to require his being responsible.—If both partners should claim the child at once, its parentage is established in both.—*Shafëi* says that, in this case, the parties must have recourse to the judgment of a physiognomist, and whomsoever he may adjudge to be the father, by similitude of features, in him the child's parentage must be established, because it is impossible to conceive the parentage of *one* child from *two* fathers, since *one* conception cannot proceed from the seed of *two* different men; the point therefore must be decided by *comparison*; especially as the prophet, in the case of *Affâma*, expressed his approbation of this mode of decision.—Our doctors rest their opinion, in this point, upon the authority of *Omar* the *Khalif*, who is recorded to have written, concerning a case of this nature, to the *Kazee Sareeh* *, as follows—“ If they cannot produce
 “ any proofs in support of their assertion, you must decline passing any
 “ judgment upon the case; but if they respectively produce their
 “ proofs, you may then also produce your decision; namely, that *the*
 “ *said child is to be regarded as the offspring of BOTH, and has a right in*
 “ *each respectively, as they also both have in him; but if one of the partners*
 “ *happen to outlive the other, he is the sole heir of the child.*” This sentence *Omar* wrote in the presence of a number of the companions of the prophet, none of whom controverted it: and the same is also related as the opinion of *Alee*.—Another argument of our doctors, in proof of their opinion, is that as both the claimants, in respect to the *foundation* of their claim, (namely, a property in the female slave, and a right in the child,) are exactly upon a level, they are likewise so in re-

or, if the claim be advanced by both partners, the parentage is established in both,

* At that period chief magistrate of *Koofa*, a city of *Chaldea*.

provided both
are upon an
equal footing
with respect
to their claim.

spect to the claim itself; and, although parentage be *indivisible*, yet there are effects attending it which are of a *divisible* nature, (such as *inheritance*, and so forth;)—hence, such of these effects as are *divisible* are established with respect to *both*, in the manner of *division*, and such of them as are *indivisible* must be determined to each of them respectively, *in toto*, and as if he had no partner.—What is now advanced relates to a case where the partners stand in no degree of affinity to each other, and are both *Mussulmans*:—but where they happen to be *father* and *son*,—or one of them a *Mussulman* and the other a *Zimnee*,—and both lay claim to the child born of the female slave as aforesaid, the decision must be given in favour of the *father*, (in the former case,) or of the *Mussulman*, (in the latter case,) because the father's claim preponderates, in virtue of his right over his son's property; and the *Mussulman's* faith gives him a preference to the *Zimnee*.—As to the circumstance of the prophet expressing his approbation in the case of *Affama*, (as cited by *Shafei*,) it is to be accounted for from the infidels scoffing, and calling in question *Affama's* birth, their scoffs being terminated by the decision of a physiognomist, which caused the prophet to express his pleasure.—It is to be observed that, where the claims of both partners to the child are admitted, the mother becomes *Am-Walid* to *both*,—because, where the claim of both is approved, and the child is decreed to belong equally to *each*, it follows that the mother is the *Am-Walid* of *each*, and upon each is incumbent one half of the *Akir* to his *copartner*; and *each* is, in every respect, upon an equal footing with the *other*.—It must also be remarked that the child is entitled to receive, from the estate of each partner, the full inheritance of a *complete child*, because each has, in his claim, made an acknowledgment in the child's behalf to this effect, which is a proof in his favour.—And the two partners are entitled to receive, from the estate of the child, the full inheritance of a father, since they are both upon a footing with respect to the *cause* of inheritance,—in the same manner as where *two* persons advance evidence respecting a *third* person of unascertained parentage, by each declaring—“*this is my child.*”

IF a person have carnal connexion with the female slave of his *Mokâtib*, and she bring forth a child, and the person abovementioned claim it, in this case (provided the *Mokâtib* confirm the claim) the parentage of the child is established in that person.—This is the doctrine of the *Zâhir Rawâyet*.—It is recorded, from *Abou Yoosaf*, that the confirmation of the *Mokâtib* is not requisite, in the same manner as that of the son is not required where the father lays claim to his son's female slave.—The principle upon which the *Zâhir Rawâyet* proceeds is, that a master has no power of action over his *Mokâtib*'s acquisitions, so long as he does not attain such power by the *Mokâtib*'s inability to fulfil the contract of *Kitâbat*, or by his breach of that contract:—contrary to the case of *father* and *son*, as a father has an undisputed power of action over his son's property; wherefore they are not analogous cases.—And here the master is responsible to his *Mokâtib* for the *Akir* of the female slave, as he has no actual property in her until *after* carnal connexion; because he *had* a certain right in her, [in virtue of her being the slave of his *Mokâtib*,] which right is of itself sufficient to the admission of the *claim of offspring*, whence there is not any necessity for considering his property in her to have existed *previous* to the embrace. In the same manner, he is responsible to his *Mokâtib* for the value of the child, because it stands as the child of a *Magroor**; since the master, in having carnal connexion with the slave of his *Mokâtib*, proceeded upon a *presumptive proof*, namely, that of her being the property of his property, (as the *Mokâtib* is his property,)—and where he (under a persuasion founded upon presumptive proof) has carnal connexion with the *slave*, it is not supposed that he is consenting to his *child* being a *slave*: hence the child is made free, in return for the

The parentage of a child, born of the slave of a *Mokâtib* is established in the *Mokâtib*'s master, if he claim it.

* *Magroor* literally signifies a person who is under a deception.—In the language of the law it is applied to a man holding carnal intercourse with a woman whilst under a misconception with respect to his right in her, or her situation:—for instance, a master of a female slave marries her to a man who conceives her to be *free*; in which case, if she has a child by her husband, (which would, in common course of law, be a slave to the owner of the mother) the father has a right to insist on purchasing his child's freedom.

value; and its descent is established in the master, as aforesaid:—but yet the mother does not become *Am-Walid* to the master, as he is not her *actual proprietor*, although he proceeded upon a presumptive proof that he was so; in the same manner as a *Magroor*, who has carnal connexion with a female slave, under the conception of her being his property, where she is not *actually* such.—What is here stated relates to a case where the *Mokâtib* confirms the child's parentage, and the master's claim: but if he deny these, the child's parentage cannot be established in the *master*, according to what has been already observed concerning the necessity of the *Mokâtib*'s confirmation;—yet, if the master should, at any future period, become *proprietor* of the child*, the descent is then established in him, because the ground thereof (namely, his former claim) still exists, and the right of the *Mokâtib*, which was the obstacle, is annihilated.

* By the demise of the *Mokâtib*, before the fulfilment of the contract of *Kitâbat*; or, by the contract becoming null in consequence of a breach of it on the part of a *Mokâtib*.

H E D A R A.

B O O K VI.

Of E I M Â N, or V O W S.

E I M Â N is the plural of *Yameen*.—*Yameen*, in its primitive sense, means *strength* or *power*; also the *right hand*:—in the language of the law it signifies an obligation by means of which the resolution of a vower is strengthened in the performance or the avoidance of any thing; and the man who swears or vows is termed the *Haliff*, and the thing sworn to or vowed the *Mabloof-ali-bee*.

Definition of
Eimân.

Chap. I. Introductory.

Chap. II. Of what constitutes an *Oath* or *Vow*, and what does
not constitute it.

- Chap. III. Of *Kafâra*, or Expiation.
- Chap. IV. Of Vows with respect to entrance into, or residence in, a particular Place.
- Chap. V. Of Vows respecting various Actions, such as *going, coming, riding, and so forth.*
- Chap. VI. Of Vows in *eating or drinking.*
- Chap. VII. Of Vows in *speaking and conversing.*
- Chap. VIII. Of Vows in *Manumission and Divorce.*
- Chap. IX. Of Vows in *Buying, Selling, Marriage, &c.*
- Chap. X. Of Vows respecting *Pilgrimage, Fasting, and Prayer.*
- Chap. XI. Of Vows in *Clothing and Ornaments.*
- Chap. XII. Of Vows in *Striking, Killing, and so forth.*
- Chap. XIII. Of Vows respecting the *Payment of Money.*
- Chap. XIV. Of Miscellaneous Cases.

CHAP. I.

Oaths [of a
sinful nature]
are of three
kinds,

OATHS are of three different kinds;—FIRST, *Ghamoos*;—SECOND, *Moonâkid*, (which is also termed *Makoodat*;)—and THIRD, *Lighoo*.

Perjury,

A *Yameen Ghamoos* * signifies an oath taken concerning a thing already

* Literally, *a false oath, or perjury.*—It is here proper to observe that the distinctions explained in this chapter relate solely to such oaths or vows as, being *false* or *broken*, are sinful, and consequently supposed to excite the divine anger, which must be appeased by expiation:

already past, in which is conveyed an *intentional falsehood* on the part of the *swearer*:—and such an oath is highly sinful; the prophet having declared—“ *whosoever sweareth falsely, the same shall God condemn to hell.*”

KAFÂRA, or expiation, is not incumbent (that is to say, is of *no avail*;) in a *Yameen Ghamoos*; but a repentance and deprecation of the anger of heaven are incumbent.—*Shafei* alleges that expiation is incumbent, because that was ordained for the purpose of doing away any disrespect shewn to the name of God, which is sinful; and this disrespect is evident in a *Yameen Ghamoos*, as it is calling God to witness to a falsehood; a *Yameen Ghamoos* is therefore the same as a *Yameen Moonâkid*; and as, in that, expiation is incumbent, so in this likewise. The argument of our doctors is that a *Yameen Ghamoos* is a crime of *great magnitude*, (or *deadly sin*,)—and expiation is an act of piety, (whence it may be fulfilled by *fasting*, and intention is a condition of it;) but there is no expiation for a *deadly sin*, and consequently there is none for a *Yameen Ghamoos*: contrary to the case of a *Yameen Moonâkid*, as that falls under the class of *Mobah*, or things indifferent.

OBJECTION.—The description of *Mobah*, or indifferent, applies to things in which there is no offence; now as a *Yameen Moonâkid* is of an offensive nature, how can it be *Mobah*?

REPLY.—The offence, in a *Yameen Moonâkid*, occurs subsequently to the declaration of it, and is occasioned by a disrespect shewn by the vower to the name of God, of his own free option; whereas the offence, in a *Yameen Ghamoos*, exists from the first; and such being the case, a *Yameen Ghamoos* is not to be confounded with a *Yameen Moonâkid*.

expiation: contrary to *true oaths*, or to vows *duly fulfilled*, as the former of these are frequently required for the sake of justice, and the latter are permitted, whence neither an *oath* nor *vow*, simply *as such*, can be supposed to require expiation.

A YAMEEN

*contracted
vows, (when
not fulfilled,)*

A YAMEEN MOONÂKID * signifies an oath taken concerning a matter which is to come.—Thus a man swears that he will do such a thing, or he will not do such a thing;—and where the pronouncer fails in this,—(that is, where he does not act according to the obligation of his oath,)—expiation is incumbent upon him: and this is established upon the authority of the sacred writings.

and inconsiderate oaths.

A YAMEEN LIGHOO † is an oath taken concerning an incident or transaction already past, where the swearer believes that the matter to which he thus bears testimony accords with what he swears, and it should happen to be actually otherwise: and from the divine mercy it may be hoped that the swearer will not be condemned for such an oath, since God has declared, in the *Koran*, “ I WILL NOT CALL YOU “ TO ACCOUNT FOR AN INCONSIDERATE OATH.” An instance of *Yameen Lighoo* is where a person sees *Amroo* passing at a distance, and, supposing him to be *Zeyd*, says—“ by God that is *Zeyd*!”

Expiation is incumbent, whether the vow be wilful or compulsory, or although the oath be taken under a deception of the memory.

A WILFUL VOW, and a compulsory vow, and an oath taken under a deception of the memory, are all the same, and on account of each expiation is incumbent ‡, because the prophet has said “ *there are three points of serious import, the sporting with which is also serious, to wit, “ MARRIAGE, DIVORCE, and a VOW.*”—*Shafëi*, controverts this doctrine.—His arguments will be hereafter recited at large under the head of *Ikrâb*, or compulsory process.

The violation of a vow, whether by compulsion or through forgetfulness, requires expiation.

IF a man do a thing which breaks his vow, either by compulsion, or through forgetfulness, these are both the same, and expiation is incumbent upon him in either case, because the specified act which is the condition of expiation is not made void by the circumstances of com-

* Literally, a contracted oath, or vow.

† Literally, a nugatory oath, or (sometimes) a rash oath.

‡ That is, if the thing sworn to be false, or the vow be violated.

pulsion

pulsion or forgetfulness:—and so also, if the thing should be done by a *maniac* or an *idiot*,—because there likewise the condition is actually fulfilled.

OBJECTION.—Expiation is not incumbent but for the purpose of obliterating a sin; now no sin can be imputed to *maniacs* or *idiots*, as such are not made answerable; it would therefore follow that expiation is not incumbent upon them.

REPLY.—Although expiation be intended for the purpose of expunging sin, yet the obligation of it in this case rests upon the *argument* of a sin, (namely, the breach of a vow,) and not upon the actual *sin itself*, so that, wherever the breach of a vow appears, expiation is incumbent.

CH A P. II.

Of what constitutes an *Oath*, or *Vow*, and what does *not* constitute it.

YAMEEN (that is, an *oath* or *vow*) is constituted by the use of the name of Almighty God, or of any of those appellations by which the Deity is generally known and understood, such as *Ribmân* and *Ribeem**. An oath may also be expressed by such attributes of the Deity as are commonly used in swearing, such as the *power*, or the *glory*, or the

An oath may be expressed by using the name of God, or any of his customary attributes;

* Anglice, the *merciful*, and the *benificent*.—Those attributes are affixed to the name of the Deity at the beginning of the *Koran*, and (in imitation thereof) at the beginning of every *Mussulman* book.

might

might of God, because an oath is usually expressed under one or other of those qualities; and the sense of *Yameen*, namely, *strength*, is by this means obtained, since as the swearer believes in the *power*, *glory*, *might*, and other attributes of the Deity, it follows that the mention of these *attributes* only is sufficient to strengthen the resolution in the performance of the act vowed, or the avoidance thereof.

excepting his
knowledge,
wrath, or
mercy.

If a man swear “by the knowledge of God,” it does not constitute an oath, because an oath expressed by the *knowledge* of God is not in use:—moreover, by *knowledge* is frequently implied merely *that which is known*; and in this sense the word knowledge is not expressive either of the name of God, or of any of his attributes.—In the same manner, should a person swear “by the *wrath* of God,” or “by the *mercy* of God,” it does not constitute an oath, because an oath is not commonly expressed by any of these attributes:—moreover, by the word *Rihmat* [mercy] is sometimes understood *rain*, and *heaven* is also occasionally expressed by that term; and by the word *Ghazb* [wrath] is understood *punishment*; and none of these are either *appellations* or *attributes* of the Deity.

It is not con-
stituted by
using any
other name.

If a person swear by any other name than that of God,—such as *the prophet*, or *the holy temple*, this does not constitute an oath,—as the prophet has said “if any man among ye take an oath, he must swear “by the name of God, or else his oath is void.”—If a person also swear by the *Koran*, it does not constitute an oath, although the *Koran* be the word of God, because men do not swear by the *Koran*.—The compiler of the *Hedaya* observes that this is where the swearer only says “by the prophet,” or “by the temple,” or “by the *Koran*,”—but if the swearer say “if I act contrary to what I now say, may I be deprived of the prophet,” or “of the temple,” or “of the *Koran*,” this constitutes an oath, because such privation would reduce the swearer to the state of an infidel, and the suspension of infidelity upon a condition amounts to *Yameen*.

AN oath is confirmed by the use of the particles of swearing; and these (in the *Arabic*) are *three*, namely, the letters *waw*, and *be*, and *te**, as oaths are commonly repeated and understood under this form; and in this sense these particles occur in the *Koran*. Let it be also observed that the particles of swearing are sometimes *understood*, though not *expressed*, that is, are omitted in the expression, although implied in the sense; and this constitutes an oath; as if a man were to say—“God, I will not do this,”—because [in the *Arabic*] it is common to reject the particle for the sake of brevity:—sometimes indeed the letter *lam* is used for the swearing particle, as it is capable (according to *Mook-târ*†) of being substituted for *be*.

Particles of
swearing.

HANEEFA alleges that if a man should swear “by the *truth* of “God,” this does not constitute an oath, and in this *Imâm Mohammed* coincides. There are two opinions of *Abou Yoosaf* recorded on this point:—according to *one* it is not an oath; but according to the other it is an oath, because truth is one of the attributes of the Deity, signifying the certainty of the divine existence, and hence it is the same as if the swearer were to say “by God, the *truth*!” and as oaths are common under this mode of expression, so an oath is here constituted. The argument of *Mohammed* and *Haneefa* is that the term “the *truth*,” as here expressed, relates merely to the identity of the godhead as the object of obedience, and hence an oath thus expressed appears to be taken by that which is neither an *appellation* nor an *attribute* of God. The learned, however, say that if a person expresses himself thus “by “the *truth* I will do so and so,” this constitutes an oath, because the *truth* is one of the appellatives or proper names of God.—But if a person were to say “I will do this *truly*,” it does not amount to an oath, because the word *truly* can only be taken, in this case, as a *corrobor-*

Swearing by
the *truth* of
God is not
an oath.

* Each of these letters, prefixed to the name of God, is expressive of the English *by*.

† A celebrated *Arabic* grammarian and rhetorician.

tion or confirmation of the promise contained in the speech, being the same as if he were to say "I shall do this *indeed*."

The expressions "I swear," "I vow," or "I testify," constitute an oath, without the name of God.

If a man say "I *swear*," or "I *vow*," or "I *testify*," whether the words "by God" be superadded or not, it constitutes an oath, because such words are commonly used in swearing: the use of them in the *present* tense is undisputed; and they are also sometimes used in the *future* tense, where the context admits of a construction in the *present*; and attestation amounts to an oath, as in that sense it occurs in the sacred writings: now swearing *by the name of God* is both customary and conformable to the divine ordinances, but *without* the name of God it is forbidden; when it so occurs, therefore, it must be construed into a lawful oath*:—hence some say that intention is not requisite in it; others, however, allege that the intention is essential, because the words here recited bear the construction of a *promise*,—that is, they admit of being received as applying *to the future*, and also of being taken as a vow without the name of God.

If a person, speaking in the *Persian* language, were to say "I swear by God," it amounts to an oath, because here the idiom confines the expression solely to the present: but if he were to say simply "I swear," some allege that this does not constitute an oath.—If he were to say "*I swear by the divorce of my wife*," this is not an oath, as an oath is not so expressed in practice.

Swearing by the *existence* of God makes an oath.

If a man, in swearing, say "by the *age*," or "the *existence*" (of God,) it constitutes an oath, because the age or existence of God signifies his eternity, which is one of his attributes. [*Several other forms of swearing are here recited, but of no consequence, as their validity or nullity depends altogether upon certain peculiarities in the Arabic idiom.*]

* That is, the superaddition of the expression "by God," must be understood in it, so as to make it appear an oath made conformably to the divine ordinance, lest the speaker, by swearing in a way that is *forbidden*, be found guilty of an *offence*.

IF

IF a person should say “ If I do this may I be a *Jew*,” or “ a *Christian*,” or “ an *infidel*,” it constitutes an oath; because, as the swearer has made the condition a sign of infidelity, it follows that he is conscious of his obligation to avoid the condition; and this obligation is possible, by his making it an oath, in such a way as to render unlawful to himself that which is lawful.—And if the oath relate to any thing which he has done in the *time past*,—as if he were to say “ If I have done so may I be a *Jew*,” or “ an *infidel*,” and so forth, this is a *Yameen Ghamoos*, or perjury. The swearer is not, however, in this case made a *Jew* or an *infidel*, because the words “ may I be an “ *infidel*,” (and so forth,) relate to some future indefinite period.—Some, on the contrary, have alleged that he becomes actually as an infidel*, because the penalty which the swearer imprecates upon himself relates to the present instant of his testimony, being the same as if he were to say “ I am a *Jew*, &c.”—But the fact is, the swearer does not become a *Jew* or infidel in either of the cases before us, (that is, in that of a *vow* with respect to the *future*, or an oath regarding the *past*,) provided he consider this merely as a *form of swearing* †: but if he believe that by thus swearing he fully subjects himself to the penalty expressed, he suffers accordingly, in either instance, because he appears consenting to infidelity, on account of having ventured upon a thing by the commission of which he conceives that he may be rendered an infidel ‡.

A vow may be contracted by the imprecation of a conditional penalty.

IF a person say “ If I do thus, may the anger of God fall upon “ me,” this does not constitute a vow, as not being a customary mode of expression for that purpose. And so also, if a person were to say “ may I be an *adulterer*,” or “ a *drunkard*,” or “ an *usurer*,” because these are not generally understood or received as forms of swearing.

* That is, becomes subjected to the penalties of actual apostacy from the faith.

† Where no other penalty than that of *expiation* can be incurred.

‡ All these cases suppose the thing sworn to be *false*.

C H A P. III.

Of *Kafâra*, or *Expiation* *.

A vow may
be expiated
by the eman-
cipation of a
slave, the
distribution
of alms,

or fasting.

THE expiation of a vow † is effected by the emancipation of a slave; and the emancipation of such a slave as suffices in *Zihâr*, suffices also in the case of a vow:—or if the swearer chuse, let him clothe ten paupers, giving to each one piece of cloth, or more; (the smallest quantity to each is as much as is necessary in prayer ‡:)—or if he please, let him distribute victuals among ten paupers, the same as in the expiation of *Zihâr*.—All these modes of effecting the expiation of a vow are authorized in the *Koran*, according to the words in the text,—
“ THE EXPIATION THEREOF MAY BE EFFECTED BY FEEDING TEN
“ POOR PERSONS WITH SUCH FOOD AS IS USUALLY CONSUMED IN
“ YOUR FAMILIES, OR BY CLOTHING TEN POOR PERSONS, OR BY
“ THE RELEASE OF A SLAVE.”—It is manifest, therefore, that, in the present instance, one of these three modes is indispensable. But if the delinquent (from his poverty, or other cause) should not be able to effect his expiation in any of these three modes, he may do it by fasting three days successively.—*Shafeï* says that he has an option; if he think proper, he may fast for three days *successively*, or for any

* The term *Kafâra* means not only an expiatory atonement for the breach of an absolute vow, but also the substitution of an expiatory act for the penalty imposed by a vower upon himself in the case of a vow suspended upon a condition, by which he had designed to restrain himself from the commission of any particular act.

† Meaning expiation for the breach or violation of a *vow*,—or for any other description of *Yameen* which admits of expiation, such as a *Yameen Lighoo*, &c.

‡ *Mussulmans* must be clothed in prayer at least from the waist downwards.

three

three separate days,—because the words of the *Koran* are, “IF HE BE UNABLE TO DO THIS, LET HIM FAST FOR THREE DAYS,” which expression is general.—The *Haneefite* doctors, in support of their opinion upon this point, quote the authority of the reading of *Abdoola Ibn Masfaood*, who expounds the text to mean *three days successively*; and this accords with what occurs in the *Hadees Mashboor* *.—With respect to what has been said of the smallest quantity of cloth sufficient in expiation, it is recorded from *Imám Mohammed*.—*Haneefa* and *Aboo Yoosaf* assert that the smallest quantity of cloth proper upon this occasion is as much as may be sufficient to clothe nearly the whole body; for a mere *Shilwár* † is not sufficient; and this is the more authentic doctrine; because one who is only thus clothed is regarded as *naked*.—That portion of cloth, however, which may not suffice in regard to *clothing* may be sufficient in *eating*, according to its value; that is, if a person were to bestow, as an expiation, such a quantity of cloth as, although it may not suffice for the proper *clothing*, yet is equal in value to the feeding of ten poor men, it suffices as a *feeding* expiation, whether such may have been the intention or not.—Thus if the person to make expiation were to give to each poor person the *half* of a proper dress, (for instance,) this would not be sufficient for an expiation by *clothing*; but if the value of the cloth thus distributed to each be equal to the price of three pounds of wheat, it suffices as an expiation by *feeding*.

IF a person perform the expiation *before* the violation of his vow, it does not suffice.—*Shafei* maintains that it suffices, where the expiation is effected by means of *property*, and not by *fasting*, because the expiator makes his atonement posterior to the occasion of it, (namely, his vow,) and hence the case is the same as that of a pilgrim performing

Previous expiation does not suffice.

* A collection of traditions so called.

† A species of drawers which are a sufficient clothing for prayer.

expiation

expiation for wounding game*,—that is, if the pilgrim perform expiation after the act of wounding, it suffices; and so also in the present case. The argument of our doctors is that expiation is ordained as an atonement for offence; but in the case before us no offence has yet appeared.—In reply to what is advanced by *Shafëi*, they observe that the vow is not the *occasion* of the offence, as nothing can be considered in any degree the occasion of an offence, but what necessarily leads thereto, and a vow does not necessarily lead to its own violation, but is rather prohibitory of it; hence the vow is not the cause of the offence in the present instance: contrary to the case of the *pilgrim*, adduced by *Shafëi*, in which the wound inflicted upon the deer leads to its destruction, by ultimately occasioning its death; these therefore are not analogous cases.—It is to be observed that whatever the expiator may have given to the poor before the violation of his vow, he must not take back again, because this is *alms*, and it is not lawful for a man to take back his *alms*.

A *sinful* vow must be broken and expiated.

IF a man bind himself, by a vow, to the commission of a sin, as if he were to swear “by God I will not pray,” or “I will not converse with my father,” or “I will murder such an one in such a month,” it is incumbent upon him to violate his vow, and perform an expiation, because it is recorded in the traditions, that if a man vow a thing, knowing that the neglect is preferable to the fulfilment, he ought to act accordingly, performing an expiation for the breach of his vow.

The vows of *infidels*, being nugatory, cannot be held as *violated*.

IF an infidel should make a vow, and afterwards violate the same, either as an *infidel* or as a *Mussulman*, (supposing him to have been converted to the faith in the interim,) still he is not forsworn, because he was not competent to make a vow; as a vow is contracted (that is, is made binding) by a reverence for the name of God, and the vower,

* Pilgrims are forbidden to destroy game of any kind within a certain distance of *Mecca*, termed the *Ihrâm* [forbidden ground] of pilgrimage.

whilst he was an infidel, cannot be supposed to have entertained any reverence for the name of God:—an infidel, moreover, is not competent to the performance of expiation, as that is an act of piety.

IF a man make certain articles unlawful to him *, which are in their own nature lawful, as if he were to say “I have made this cloth (or, *this provision*) unlawful to me †,” yet such article does not actually become unlawful to him, but he must perform expiation when he happens to put on that cloth, or to eat that provision.—*Shafei* says that expiation is not incumbent upon him, because rendering unlawful that which is lawful does not amount to a vow, as a vow is an act authorized by the law.—The argument of our doctors is that the words “I have made unlawful,” evince the establishment of illegality in the thing: now there is a possibility of establishing illegality in a thing that is really otherwise, by supposing that the speaker had taken an oath that he would not wear the clothes, or eat the provisions; and this supposition is adopted, in order to establish the illegality declared by the speaker; and it follows that whenever he does that thing which he has rendered illegal to himself, he becomes forsworn, whether the matter be great or small, because when unlawfulness is once established in a thing, the illegality pervades every part of it.

Vows of abstinence.

IF a man were to say “every thing lawful is unlawful to me,” every species of food and drink forthwith becomes unlawful to him, unless where the intention or design of the vow has regarded something else.—This proceeds upon a favourable construction. Analogy would suggest that the vower, as soon as he has uttered his vow, must become forsworn, as being unavoidably and continually placed in the performance of some lawful act, such as *breathing, moving, resting*, or

* This is a phrase by which is understood a vow of *abstinence* from the thing expressed.

† In reciting these forms of vows, the address [“*by God*,” or “*I swear*,” &c.] is, for the sake of brevity, omitted; it is always however to be understood.

so forth; and such is the opinion of *Ziffer* upon it;—but the more favourable construction is that the design of the vow is to establish something, the commission of which shall be a crime; and as this cannot be effected where the intention, from the words of the vow, appears to be *general*, regard to its universality drops, and such being the case, the vow will be construed as respecting *meat* and *drink*, for the sake of general application, as it is in practice commonly applied to the articles of customary subsistence. A vow of this nature does not include the use of women, unless by the intention of the vower; but in this case it constitutes an *Aila*, because the form of words here recited is a *vow*, bearing the interpretation of “by God, I will not have carnal connexion with my wife:” and it is to be observed that, where the vower, by the words “*every thing lawful*,” intends *woman*, yet meat and drink are not excluded from the vow, but still remain and are to be considered as constituting a part of it.—What is now advanced is taken from the *Zâbir-Rawâyet*.—Our modern doctors have said that divorce follows a vow of this form, independant of the intention, as the aforesaid words are frequently used in divorce; and there are decrees upon record to this effect. It is also proper that the same rule should hold where the vow is pronounced in the *Persian tongue*, for the sake of general application.—Let it be observed, however, that if a man were to say “whatsoever I have in my right hand is unlawful to me,” there is a difference among casuists concerning the effect of it;—some doctors say that the intention is a condition, whilst others maintain that it is not so; it is evident, however, that divorce takes place from it, independent of the intention, on account of custom.

A vow is binding without any condition annexed.

If a person expresses a vow in *general* terms, that is, not suspended upon a condition, as if he were to say “I shall fast upon such a day for the sake of God,” he is bound to the observance thereof, because it is said, in the traditions, “*whoever makes a vow, and specifies it, he is bound to the observance of what he has so specified.*”

IF a person suspend a vow on a condition, and the condition afterwards occur, he is bound to the performance of what he has vowed; and expiation is here of no avail, because the tradition above recited is general,—that is, applies to a *suspended* as well as an *unsuspended* vow; and also, because a vow suspended upon a condition becomes, upon the condition taking place, the same as one of *immediate performance*.—It is recorded of *Haneefa*, that he receded from this doctrine, alleging that if a man were to say (for instance) “if I do so, I am under obligation to perform a pilgrimage,” or “to fast a year,” or “to bestow all my property in alms,” and then perform an expiation for his vow, it suffices; and such is the opinion of *Mohammed*.—If, however, the vower should not make an expiation, but perform the thing which he had specified, he is discharged from the obligation of that also, provided the condition be of such a nature as that the vower had no intention it should ever take place. The reason of this is that, where the condition is of the description now mentioned, the speech of the vower, as aforesaid, bears the sense of a *Yameen*, or *suspended* vow, and also of a *Nuzr*, or *absolute* vow:—evidently of a *Nuzr*, because such a form of words is commonly used to express a *Nuzr*;—and also of a *Yameen*, because the design of the person, in so speaking, is to restrain himself from doing the act which constitutes the condition: and such being the case, it remains at his option either to perform expiation, regarding his words in the light of a *Yameen*, or to perform the condition specified, regarding them in the light of a *Nuzr*: it is otherwise, however, where the thing conditioned is not of the abovementioned description, but is *actually intended* by the speaker,—as where a man (for instance) says “if God grant me a recovery from this illness, I am under an obligation to perform a pilgrimage,” for here expiation does not suffice, but it is incumbent upon him to perform the actual thing specified, because in this case the words do not bear the sense merely of *Yameen*, but also of an absolute vow of performance:—and this distinction is approved.

A vow pronounced, with a reservation of the will of God, is null.

IF a person make a vow of any thing, adding “if it please God,” as if he were to say “by God I will do this, God willing,” he cannot be forsworn, because the prophet has said “*he who vows any thing, adding ‘if it please God,’ cannot be forsworn.*”—It is to be observed, however, that it is a condition that the words “God willing” do follow in immediate connexion with the words preceding, because if they be pronounced separately, after having uttered the vow, it is a retractation; and a retractation in *Yameen* is not lawful.

CHAP. IV.

Of Vows with respect to entrance into, or residence in, a particular Place.

A vow against entering a house is not violated by entering a mosque, church, &c.

IF a person make a vow, that “he will not enter *any house*,” and he should afterwards enter a *mosque*, or *synagogue*, or *church*, he is not forsworn, because a *house* is a place built for the purpose of *dwelling* in, (that is of *sleeping*, &c.) and buildings of the above description are not designed for this purpose:—the rule is also the same, if the swearer should enter a *porch* or *portico* before the door of a house for the same reason.—Some have asserted that if the portico be inclosed, in such a manner, that when the front door is shut, a person may be said to be *in the house*, the swearer by entering such portico violates his vow, it being customary for persons to reside and sleep in such a place.—If the swearer also enter an *Iwân** he is forsworn, because that is de-

* An *Iwân* is an open gallery or balcony, on the top of, or adjoining to, an house,—the roof of which is generally supported by *peirs* or *pillars*, for the benefit of the air, in the hot season.

signed as an occasional residence in the hot weather, and is a species of dwelling as much as a summer or winter residence. Some have conceived that this is the case only where the *Iwân* has *four walls*, [that is, where it is a complete quadrangle:] this distinction is made, because those buildings in *Koofa*, and other parts of *Arabia*, are generally so constructed; whereas, with us [that is, in *Hindustan* and *Persia*] they have commonly *three walls* only, being quite open in front, and therefore are not to be considered as a *house*.—Others, however, say that entering an *Iwân* is a violation of the vow, whether it be constructed of *three walls*, or of *four*; and this is approved.

If a person swear that “he will not enter into a *place*,” that is, into a *Serai*, and he afterwards enter a place which is desolate and in ruins, he is not forsworn: but if a person swear that “he will not “enter such a place,” the place being then in a good and habitable state, and he should enter it after it had fallen to ruin, and been laid level with the plain, he is forsworn, because the term *Daar*, among both the *Arabs* and *Persians*, means any particular place, as with them it is common to say “such a *Daar* is peopled,”—or “such a *Daar* is “desolate, (that is, *abandoned*;”) now an *edifice* is the description of the term *Daar*, and this description is regarded in the *first* of the above cases, but not in the *last*.

A vow against entering a *Serai* is not violated by entering a ruin.

If a man take an oath, saying “I will not enter into this *Daar*,” and the said place should afterwards become ruined and desolate, and should again be rebuilt, or repaired, and the swearer should after that enter it, he is forsworn, according to what was before observed, that the appellation *Daar* still continues to be applied to the place, after the destruction of the edifice which stood upon it:—but if this place, after having been ruined and desolate, should be rebuilt as a *mosque*, *bath*, or *dwelling-house*, and the swearer should, after that, enter it, he is not forsworn, because in any of these cases the term *Daar* is no

longer applied to the place, as it is then called by another name, such as *mosque*, and so forth: and the same rule holds where this person enters that place after the destruction of such *mosque*, *bath*, or other public building, as may in the interim have been erected there, because the place will not recover its original name after such destruction.

A vow against entering any particular house is not broken by entering it when in ruins.

IF a man swear "he will not enter such a dwelling-house," and he should enter therein after it had been destroyed or become desolate, he is not forsworn; because the term *dwellinghouse* is abrogated, as no person then dwells in it; whereas, if the roof only should have fallen in, and the walls remain, and he were then to enter it, he would be forsworn, because it is still considered as *habitable*, and the place does not lose its appellation of a *dwellinghouse* [*Bait*] from that circumstance. In the same manner, he is not forsworn where, the house having been destroyed and laid level with the plain, another house is built upon the same spot, and he then enters this house,—because the term *dwellinghouse*, as applied to the *former* house, was rendered inapplicable by the circumstance of its *ruin*.

A vow against entering a house is not violated by going upon the roof, or entering the portico, &c.

IF a man swear that "he will not enter a certain house," and he afterwards go on the top of the house, from the *outside*, he is forsworn, because the roof is a part of the house. Some have said that, with *us*, he is not forsworn.—In the same manner, he is forsworn if he enter the *portico* only of the house specified in the vow. The compiler of the *Hedaya* observes that this case admits of a distinction: thus, if the portico be such as that, if the door be shut, it forms a part of the house, and it be covered in, he is forsworn, but if otherwise, he is not forsworn.—If he stand under the arch of the doorway he is also forsworn, provided the arch be so constructed as that when the door is shut it becomes included as a part of the house; but if the arch be so situated as that, after shutting the door, it is not included as a part of the dwelling, he is not forsworn, because the door is designed as a protection

tection to the house; so that whenever the archway is not, by shutting the door, included as a part of the house, but is without the door, it is evident that it is not included in the house.

If a man should swear "I will not enter into this house," and it should so be that he is in the said house at the time of swearing thus, he is not forsworn by sitting down in that house, nor unless he go out of the house, and again enter it. This is upon a favourable construction.—Analogy would suggest that the vower is forsworn, because the effect of the *commencement* of the act and of its *continuance* is one and the same; and as he would be forsworn by the *commencement* of the act, so he is by its *continuance*: but the more favourable construction is that, admitting the effect of the *commencement* and the *continuance* to be the same, yet this can only be where the act is of such a nature as to be capable of *continuance*, which the *entrance* into a place does not allow, as the word *entrance* simply implies passing from without to within.

Case of vows respecting abstinence from a thing in which the vower is at present engaged.

If a person swear that "he will not put on a particular garment," and should happen to have the said garment upon him at the very time of his so swearing, and should forthwith take it off, he is not forsworn. And so also a person riding upon a mule [or other beast] if he takes an oath, saying "I will not ride upon this animal," and should forthwith alight, he is not forsworn. In the same manner, a person residing in a house, if he swear that "he will not live in this house," and thereupon begin to remove out of it, he is not forsworn.—Ziffer maintains, however, that the swearer, in the last of these instances, is forsworn, as the circumstance upon which the violation of his vow is suspended, (namely, his residence in the house,) does already exist, however short the time may be. Our doctors argue that a vow is imposed with a view to the fulfilment of it, and therefore, that in the present instance, such a space of time as admits of the fulfilment must be excepted from the vow; and hence, if the swearer make any delay, he

he is forsworn, because such acts as are here mentioned are capable of continuance, as a man may, with propriety, say “ I rode *a whole day,*” or “ I wore such a robe *for a day:*” contrary to the act of entrance; as a man could not say “ I entered for a day:” and the possibility of continuance in such acts being thus proved, it follows that the effect of the commencement and the continuance is one and the same:—but if the swearer should here purely intend the *commencement* of the act, and say that his design was to vow that “ he would not ride again,” (for instance,) his declaration is to be credited, as his words admit of that construction.

If a man make a vow, saying “ I will not reside in this house,” and he should himself leave the house, his family and effects still remaining in it, although he may have no intention of returning to reside there, yet he is forsworn, because he is still supposed to be an inhabitant of that house, from the circumstance of his family and effects continuing therein; as merchants, who reside in the *Bazârs*, [that is, have *shops* there,] say, notwithstanding, “ *they reside in such a street,*” meaning *the residence of their families.*

A vow against residing in a city is not broken by the vower's family continuing there.

If a man make a vow, saying “ I will not reside in this city,” and he go forth from it, resolving not to return thither, although his family should still continue to reside there, yet he is not forsworn, and his observance of the vow does not depend upon his carrying his family and effects out of that city, according to what is recorded from *Aboo Yoosaf*, because (contrary to the preceding case) he is then no longer considered as an inhabitant thereof in the customary acceptance:—and a village is (in the *Rawâyet Saheeh*) declared to be the same as a city, with respect to this rule.—*Haneefa* observes, upon the preceding case, that the removal of the whole of the effects from the house is necessary, inasmuch that if even a *single nail* of the vower's property be left therein, he is forsworn,—because, as his residence in that house was understood from the whole of his effects being there,

so

so will it still be understood whilst any part of them remains therein.—*Abou Yoosaf* alleges that the removal of a principal part of them is sufficient, because the removal of the whole is sometimes impracticable. *Mohammed* says that the removal of such quantity only is necessary, as might be sufficient for housekeeping, because any thing beyond that is not of a *residential* nature; and the learned have agreed that this is the most laudable distinction.—It is here requisite that the swearer remove to another house, without delay, in order that he may observe his vow; for if he should not remove into another *house*, but into the *street* or a *mosque*, the learned in the law say that he does not fulfil his vow; the reason of which is that if a person were to remove out of a city with his family, so long as he does not fix upon another place of abode, his first residence remains with respect to prayer*; whence, if he return to his former abode, he is still accounted an inhabitant; and the same holds good in the present case.

CHAP. V.

Of *Vows* respecting various *Actions*; such as *coming, going, riding, and so forth.*

IF a man swear that he will not go out of the mosque, and afterwards desire another to *carry* him forth from it, and the other do so, he is forsworn, because an act performed by the direction of any per-

An evasion of a vow is a violation of it.

* That is, he is supposed to be included in the public prayers offered up in the mosques for the welfare of that city and its inhabitants.

son is attributed to the *director*, and it is here, therefore, the same as if he had mounted a beast, and rode out upon it: but if another person were to carry him out of the mosque *by compulsion*, he is *not* forsworn, because the act of a person compelling cannot be attributed to the person who is forcibly compelled, as he gave no direction in it.—If, moreover, a person should carry out the swearer *with his will*, but *without his direction*, he is not forsworn, (according to the *Rawāyet Sabeeh*,) because his removal cannot here be established, as it can only be so by the circumstance of his directing or desiring it, and not by his *will* alone; and his *desire* or *direction* do not appear.

If a man swear that he will not *go forth* [from his house] except to a funeral, and he afterwards go to attend the funeral, and some other business should then occur to him, and he go upon that business, he is not forsworn, because the act of going to the funeral was excepted from his vow, and his motions after that are not *forthgoings*, as by *going forth* is understood removing from the *inside* of a house to the *outside*.

If a man swear, saying “ I will not go forth towards *Mecca*,” and he afterwards go forth with a design of going to *Mecca*, and return, he is forsworn; because his *going forth* with a design of going to *Mecca* (which is the condition) is here found, since, by *going forth* is understood removal from the *inside* of the house to *without*, which has here occurred. But if he should have sworn, saying “ I will not *come to Mecca*,” and he afterwards go *towards Mecca*, and return, he is not forsworn, nor until such time as he actually enters *Mecca*, because *coming* implies *arriving*, and that has not taken place. If a man swear also “ that he will not go towards *Mecca*,” some lawyers say that the case will be the same as this last recited, whilst others assert that it corresponds with the preceding case; this last, however, is the more approved doctrine, because going implies removal, and *arrival* is not necessary to constitute *removal*.

If

IF a man make a vow that “ he will go to *Mecca*,” and he should not go to *Mecca* during his life, he is forsworn; but he will not be accounted forsworn until after his death, because whilst life remains there is a hope of his fulfilling his vow.

An undetermined vow of performance is not violated until the death of the vower.

IF a man make a vow, saying to his wife “ if you go out unless “ by my permission, you are divorced,” and he should afterwards once grant such permission, and the woman go out accordingly, and she should *again* go out without her husband’s permission, the consequence of his vow is incurred, (that is, the woman becomes divorced,) because permission is requisite each time that she goes out, as he has excepted from his vow the act of her going out *with* his permission, and any other act of going out beyond that is included in the inhibition, wherefore the consequence is induced by her going forth without his permission.—If the vower explain, saying “ I intended *one* permission only,” his declaration is to be credited in a *religious view*, but not in point of *law*, because, although his words, as above, are capable of this construction, yet it is contrary to their apparent tendency.

Vows made with a view of prevention.

IF a woman be desirous of going out, and her husband say “ if “ you go out, you are divorced,” and she thereupon sit down, and afterwards go out, the consequence is not induced,—that is, divorce does not take place:—and so also, if a man be desirous of beating his slave, and another vow “ if you beat him, such an one my slave is “ free,” and the man, desisting only for a momentary space, beat his slave, the slave of the other person does not become free. The reason of this is that the design of the speaker in what he vows is to prevent that going forth of the woman, or that which (according to what then appears) the *woman* or the *master* is intent upon doing, and of course the vow is restricted to *that* beating, or *that* going forth, as the *foundation* of vow rests upon what appears at the particular crisis.—This species of vow is termed *Yameen Fowr*, or a *sudden* vow:

Case of a vow expressed generally, but restricted, in its sense, to some particular occasion.

and *Haneefa* is the first who makes any mention of this kind of vow; for previously vows were described as of two species, one *general*, (as where a man says “I will not do so,”)—and the other *restricted*, (as where a man says “I will not do so *this day*:”)—but *Haneefa* deduced from these a *third*, saying “the *third* sort is that which is *general* with respect to the *words*, but *restricted* with respect to the *sense*.”

If a man invite another to sit down and eat breakfast with him, and the other make a vow, saying “if I eat breakfast my slave is free,” and he should then proceed to his own house, and there eat his breakfast, he does not incur the penalty of his vow, because what he said, as being an answer, relates solely to the speech of the other person, and is therefore construed as regarding that breakfast to which the other had invited him. But if the person thus invited were to answer “if I eat breakfast *this day* my slave is free,”—upon his breakfasting either there or elsewhere at any time during that day the penalty is incurred, because here he has superadded to his reply the expression, “*this day*,” and hence what he has said is rendered a separate sentence and not a reply.

If a man swear that he will not ride upon the beast of any other person, and he should afterwards ride upon a horse, the property of one of his slaves, who is a *Mazoon*, he is not forsworn, (according to *Haneefa*,) whether such *Mazoon* be involved in debt or not.*.—If the *Mazoon*, however, should be *very much* involved in debt, the vower is forsworn, although he should not intend it, as the master, in such case, is not held (by *Haneefa*) to be possessed of any property in the animal. If, on the contrary, the debts of the *Mazoon* be of trifling consequence only, or if he should not be in debt at all, the master is not forsworn, where he does not intend it, because in either case, he

* Because all the effects of his slave are virtually his own property, provided the slave be not involved in debt.

is himself the virtual proprietor of the animal:—but the animal is held to belong to the *Maxoon*, both in the eye of the law, and also by common usage, and hence concerning his belonging to the master there is no doubt; wherefore his intention in the act is requisite. *Abou Yoosaf* says that he is not forsworn in any of those cases, unless he be so *intentionally*, because whether the animal be the property of the master or not is dubious. *Mohammed*, on the other hand, says that he is forsworn, although he be so unintentionally, since the animal is his property, as the two disciples hold that debt is in no respect repugnant to a slave being the property of his master.

CHAP. VI.

Of Vows with respect to *Eating* or *Drinking*.

IF a person swear that “he will not eat of such a date-tree,” his vow relates to the *fruit* of that tree only, because he has referred his vow to a thing which is not *eatable*, namely, the *tree*; wherefore his vow is metaphorically taken to regard the article which is the *product* of the tree, namely, the *dates*; and the subject admits the metaphor, as the date-tree is the cause of that article existing.—But it is a condition that the dates do not undergo any change by a new operation; for if he were to drink a *Nabbeesa* (or infusion) prepared from these dates, or juice expressed from them, yet he would not be forsworn.

Vows with respect to eating *dates*.

A vow of abstinence from any thing is not broken by eating that thing when it has acquired a new description,

IF a man swear that “ he will not eat of those *Boofrs*,” [half ripe dates,] and should afterwards eat of them when they have become ripe, he is not forsworn; and so also, if he should swear that “ he will “ not eat of those *Ritbs*,” [ripe dates,] “ nor drink of this milk,” and he afterwards eat of these mixed together, after the *Ritbs* shall have become *mellow*, and the milk *coagulated*; because the description of *half ripe* or of *ripe* is the motive of the vow, and those descriptions are no longer applicable; and in the same manner, the milk being in the state of *milk* is the motive of the vow, wherefore the vow is taken respecting it *in that state*; milk, moreover, is ranked among eatables, wherefore, by *milk* is not understood any thing which may be produced from it.—It is otherwise where a man vows that “ he will not converse with such an *infant*,” or “ with such a *youth*,” and he converses with the infant after he becomes a man, or with the youth after he has become aged,—for here he is forsworn; because refraining from converse with a *Mussulman* is forbidden by the law, whether such *Mussulman* be an infant or a youth; hence the descriptions of infancy or adolescence are not regarded, in the eye of the law, as motives of the vow; consequently the vow is understood to respect *such a person*; and the vower is accordingly forsworn if he converse with that person after he arrives at years of maturity.

or denomination.

IF a person swear that “ he will not eat of such a kid,” and he should eat thereof after the said kid shall have become a *goat*, he is forsworn, because the description of *kid*, in such an animal, is not the motive of the vow, since a person who avoids eating the flesh of *kids* still more avoids eating the flesh of *goats*.

IF a man make a vow that “ he will not eat *Boofrs*,” (unripe dates,) and should afterwards eat *Ritbs*, (ripe dates,) he will not be forsworn, because *Ritbs* are not *Boofrs*.

IF

IF a person make a vow that “ he will not eat *Ritbs* or *Boofrs*,” and he should afterwards eat *Mozennibs*, (dates which are beginning to ripen,) he is forsworn according to *Haneefa*.—The two disciples say that he is not forsworn by eating *Boofr-Mozennibs*, in a case where he may have sworn not to eat *Ritbs*; neither does he violate his vow by eating *Ritb-Mozennibs*, in a case where he has made a vow against eating *Boofrs*; because *Ritb-Mozennibs* are termed *Ritbs*, and *Boofr-Mozennibs* are termed *Boofrs*. Thus it is the same as if a man were to make a vow with respect to *buying*;—that is, if a man were to swear that he will not this day buy *Ritbs*, (or *ripe* dates,) and he should afterwards on that same day purchase *Mozennibs*, (or *half* ripe dates,) he is not forsworn; and so in this case likewise.—The argument of *Haneefa* on this point is that *Ritb-Mozennibs* are such as rather incline to *Boofrs*, and *Boofr-Mozennibs* are the reverse,—(that is, such as rather approach to *Ritbs*,) wherefore eating either of those is eating *Boofrs* or *Ritbs*, and the vow regards one or other of them:—contrary to the case of *buying*, as the buying relates to every species, wherefore the *inferior* species is a dependant of the *superior*.

IF a man vow that “ he will not buy any ripe dates,” and he should afterwards purchase a cluster of *unripe* dates, among which there may chance to be some *ripe*, he is not forsworn; because the purchase relates to the *whole*, and the *smaller* quantity is a dependant of the *greater*:—but if the vow were made with respect to *eating*, he is forsworn; because the eating of them relates to *from time to time*, wherefore the vow regards *every one* of them. This case is therefore the same as if a man were to vow that he would not purchase any *barley*, and he should afterwards buy *wheat*, having among it some grains of *barley*, in which case he is not forsworn:—but if he should vow that he would not *eat* any *barley*, and he should afterwards eat *wheat*, among which are some grains of *barley*, he is forsworn, for the reason here stated.

IF a man vow that “ he will not eat flesh,” and he should afterwards

wards eat the flesh of fish, he is not forsworn, on a favourable construction of the law.—Analogy would suggest that he is forsworn, because the meat of fish is termed *flesh*, and so it is denominated in the *Koran*: but the reason for the more favourable construction of the law is that the meat of fish is only termed flesh *metaphorically*, as *flesh* is produced from *blood*, and there is no blood in *fish*, on account of their inhabiting the water. If the vower, on the contrary, were to eat of the flesh of a *hog* or a *man*, he would be forsworn; because that is actually *flesh*, although the use of it be *forbidden*, and a vow is sometimes made with respect to forbidden things: and in like manner he is forsworn if he were to eat of the *liver* or the *paunch* of any animal, because that is in reality *flesh*, as being produced from *blood*, and is, moreover, used in the same manner as flesh. Some say that, in our times, the vower is not forsworn by eating of *liver* or *paunch*, as these articles are not among us accounted *flesh*.

If a person swear that “he will not eat or buy *fat*,” (that is, *tallow*,) he is not forsworn by eating or purchasing fat, unless it be the fat or tallow of the *belly*.—The two disciples allege that the swearer would violate his vow by purchasing or eating the fat of the *back*; because the peculiar quality of tallow, which is *melting in the fire*, exists in this species, as well as in that of the belly.—The argument of *Haneefa* is that the fat of the back is in reality *flesh*, as being produced from *blood*; and it is, moreover, used as flesh, and thence the flesh derives its value and goodness; for which reason a person eating it would violate his vow, where he had sworn not to eat *flesh*, and is not forsworn by selling the fat of the *back*, where he had sworn that “he would not sell *fat*.”—Some allege that this difference subsists only where the vower has sworn concerning *fat*, but not where he has sworn concerning *tallow*, as that is never used in the way of *flesh*.

If a man make a vow that “he will neither eat nor buy flesh or fat,” and he should afterwards either eat or purchase the fat tail of a sheep, yet he is not forsworn; because this part is altogether distinct from

from both flesh and fat, as not being used for the same purpose as either of them.

IF a man swear that "he will not eat of this wheat," he does not violate his vow, unless he *chew* it; and if he should eat *bread* made of the *wheat*, he is not forsworn, according to *Haneefa*.—The two disciples maintain that by eating the said bread he is forsworn, since by the terms of the vow is also understood *wheaten bread*, according to common usage.—The argument of *Haneefa* is that, the eating of wheat is a thing actually practised, as men eat wheat boiled and dressed in other modes, and the *literal* acceptation must (according to his tenets) always be preferred to the *metaphorical*, although that be sanctioned by custom.—If the swearer should *chew* the wheat, the two disciples coincide in opinion with our doctors, that he is forsworn; and this is approved, since the *eating* of the wheat comprehends the *chewing* of it, in the common form of *Metonymy*, as where a man vows that he will not *set his foot* in the house of such a person, and afterwards enters that house, in which case he is forsworn, whether he *rides* into the house, or goes in *on foot*.

IF a man make a vow, saying "I will not eat of this flour," and he should afterwards eat *bread* made thereof, he is forsworn; because flour is not eaten in its simple state, and hence it is construed to mean such articles of food as are prepared from it.—If, on the contrary, he were to eat the actual flour, he is not forsworn; and this is approved; because here it is certain that the words were intended in their *metonymical* sense, and with that sense the eating of flour in its simple state does not accord.

IF a person swear that "he will not eat *bread*," by this is to be understood, such bread as is commonly eaten in that place; and this is, in general, either *wheaten* or *barley* bread, one or other of which is almost universally used. If, also, the swearer should eat *walnut* or

almond

almond bread in *Irák** he is not forsworn; because such bread is not common in that region; whereas, if he were to eat such bread in *Tabristán*†, or any other place where it is the usual diet, he would violate his vow.

If a person swear that “he will not eat *Shawá*,” (or *stew*,) then the oath relates to the *flesh* of the stew, and not to the *vegetables* or *eggs* that may be mixed with it; because the term *Shawá* means the *meat* of the stew, and is therefore to be construed in its *literal* meaning, unless where the swearer may have intended by the word *Shawá* to express and include the abovementioned articles also, when the abstinence ought to be conformable to the intention.

If a person swear that “he will not eat *Tabbeekh*,” (or *boiled meat*,) his vow respects *boiled flesh*‡. This proceeds upon a favourable construction of the law, according to general usage; and the ground of it is, that the *unrestricted* sense of *Tabbeekh* cannot be admitted, on account that this would preclude the vower from the use both of *food* and of *medicine*, which is not his design. The term *Tabbeekh*, therefore, is here construed to mean the particular thing usually understood by it, (namely, *flesh cooked in water*,) unless where the intention of the vower may have extended farther, as if he were to declare that he meant thereby *every species* of boiled provisions,—for here his declaration is to be credited, since this is a violence to himself, and a man is empowered to inflict penalties upon himself. If moreover, in this case, the vower were to sup of the *broth* of *flesh-meat* he is forsworn, because it partakes of the quality of flesh, and broth is also

* A division of *Persia*: the ancient *Chaldea*.

† A province in upper *Persia*: the ancient *Hyrkania*.

‡ *Tabbeekh* literally means *boiled*; in common usage it signifies *boiled flesh*; but according to its *literal* meaning, the term might equally well be applied to any other food.—This whole case turns upon the *express* and *generally accepted* meaning of the word.

termed

termed *Tabbeekh*, wherefore he would be forsworn, “as having eaten *Tabbeekh*.”

If a person vow that “he will not eat any *Rás*,” [head,] by this is to be understood the head of an animal, as usually prepared for cookery, and exposed to sale.—It is written in the *Jama Sagheer*, that if a person swear that he will not eat *Rás*, by this is understood the heads of *cows*, *bullocks*, and *goats*, according to *Haneefa*;—but that the two disciples hold it restricted to the heads of *goats*.—This diversity of opinion, however, arises solely from the difference of times; for in the time of *Haneefa* the word *Rás* was used to express the heads of both kinds; but in the time of the two disciples, the heads of *goats* only; and in our times, decrees are issued according to whatever may be customary in conformity with general usage, as is mentioned in the abridgment of *Kadooree*.

If a person vow that “he will not eat *Fákiba**,” and he should afterwards eat of *oranges*, *citrons*, *dates*, *pomegranates*, or *cucumbers*, he is not forsworn; but if he should eat *apples*, *melons*, or *apricots*, he violates his vow.—This is according to *Haneefa*.—The two disciples say that he is also forsworn, if he eat *oranges*, *dates*, or *citrons*. In short, *Fákiba* is a term used to express things introduced as a delicacy before or after meals, (that is, such things as are indulged in as a delicacy over and above the common food;) and it is the same whether the fruit of which it is composed be *dried*, or in the *natural* state, provided it be thus indulged in, in both ways, (for the vower would not be forsworn by eating dried melons, which it is not common to use as a superfluous delicacy,) and this is the case with apples, melons, and apricots, wherefore he would be forsworn by eating them; but it is

* *Fákiba* is said, in the lexicons, to mean *fruit*; it in reality means any superfluous delicacy which does not come under the denomination of *food*, and this generally consists of fruit.

not the case with cucumbers and citrons, as these are considered merely as *vegetables* in *buying* and *selling*, and also in *eating*;—in *buying* and *selling*, as they are sold by green-sellers;—and in *eating*, as they are, at the time of meals, set along with other vegetables; wherefore the vower is not forsworn by eating *cucumbers* or *citrons*. With respect, however, to oranges, dates, and citrons, there is a difference of opinion, as above mentioned;—for the two disciples maintain that by eating of those the vower is forsworn, as the description of *Fâkiha* is applicable to them, since they are the most rare of all delicacies, and a higher treat than any other: but he is not forsworn, according to *Haneefa*, because oranges and dates are eaten as *food*, and men eat citrons also as a medicine; wherefore the description of *Fâkiha* is incomplete, since they are used for the support of life; and hence it is that when dried they are used in *cookery*.

IF a person vow that “he will not eat *Idâm*,” by this is to be understood any thing which is usually eaten in bread;—thus *Kabobs* are not considered as *Idâm*, whereas *salt* is supposed to come under this denomination.—This is according to *Haneefa* and *Aboo Yoosaf*: but *Imâm Mohammed* says that whatever is most commonly eaten along with bread is to be regarded as *Idâm*, (and there is also an opinion recorded from *Aboo Yoosaf* to this effect,) because *Idâm* is derived from *Mowâdemit*, or *congeniality*, and such articles are usually eaten with bread as are agreeable and congenial thereto, such as simple flesh, fowls, and so forth.—The argument of *Haneefa* herein is that *Idâm* implies that which is eaten as a *dependant*, and dependancy is *actually* found in a case of *admixture* where it stands in the place of bread; and it *virtually* exists where the article used is of such a nature as never to be eaten alone. With respect to what *Aboo Yoosaf* alleges of *Idâm* being derived from *Mowâdemit*, or *congeniality*, it may be replied that such congeniality is completely found in *admixture*:—and *vinegar*, or other similar fluids, are never eaten alone, but mixed with bread or other food; and *salt*, also, is not usually eaten *alone*; and it moreover is liable to melt;

melt; wherefore it is a dependant: (contrary to the case of *flesh*, and other corresponding substances, which are frequently eaten alone:)—and hence, by eating these, the vower is not forsworn, unless where he intends such articles in his vow, for this is a violence to himself, and a man is empowered to inflict penalties upon himself. It is to be observed that oranges and dates are not considered as *Idám*: this is approved.

If a person make a vow that “he will not eat *Ghadd*,” [*dinner*,] by this is understood eating at any time from *daybreak* till *noon*; as by *Asba*, [*supper*,] is understood what is eaten between *meridian prayer* and *midnight*, because any time after the sun’s declination from the meridian is the time of *Asba*. Some assert that this was the distinction among the *ancients*; but that with the *moderns* the time of *Asba* is from afternoon prayer; and the morning meal is that which may be eaten between midnight and daybreak, because the morning is from midnight until daybreak.—It is to be observed that where a person makes a vow against eating dinner or supper, a *full and entire meal* is to be understood of either, such as is customary: this will, of course, be regulated by the usual quantity of those meals in different countries respectively; but, to violate the vow, more than *half* the usual quantity must be eaten.

If a man make a vow, saying “if I clothe myself, or eat, or “drink, my slave is free,” and he should explain his intention, in the first of these articles, to regard a *particular kind* of cloth only, his declaration is not to be credited either with respect to a decree of the *Kázee*, or in a religious view; (and the same is to be observed with respect to the two other articles of *eating* and *drinking*;) because intention is not approved unless it be expressed, and the cloth, or so forth, are not mentioned in the vow.—If a man, also, were to make a vow, saying “if I put on a robe,” or “eat food,” or “drink wine,—my “slave is free,” and he afterwards say that he meant *this* robe and

X x x 2

not

not *that* robe, or so forth, his declaration is not to be credited in point of law: but it is credited in a religious view, because the words *robe*, *food*, and *wine*, are here mentioned; but yet an intention of *discrimination* with respect to them contradicts appearances, wherefore his declaration is not to be credited as far as regards a decree of the *Kâzee* *.

Vows respecting drinking out of a fountain or vessel.

IF a person were to make a vow that “ he would not drink out of “ such a fountain,” and afterwards lift water out of the fountain in a cup, and drink, he is not forsworn,—nor unless he lift it with his mouth, [that is, drink it *without* a vessel,] in which case he would be forsworn.—The two disciples say he is forsworn if he drink it out of a cup, as this is the usual mode of drinking. *Haneefa*’s arguments are deduced from the *Arabic*.

IF a man make a vow, saying “ I will not drink of the water of “ such a fountain,” and afterwards drink the water of the fountain out of a vessel, he is forsworn, because the water of the fountain, after being taken up and drank, is still referred to the fountain, which is the condition; he is therefore forsworn, as much as if he were to drink water out of a stream which runs from the fountain.

IF a man make a vow, saying “ if I do not drink, *this day*, of “ the water which is in this vessel, my wife is divorced,” and it should so happen that there is *no* water in it, he is not forsworn; and so also (according to *Haneefa* and *Mohammed*) if there be water in the vessel, and it should chance to be spilled before the night of that day.

* That is, if a man, having made such a vow, were afterwards to perform any of the acts therein specified, pleading that he made his vow under a restrictive intention, and that the articles he has eaten or drank, or the robe he has put on, were meant as *exceptions* therefrom, the possibility of the truth of this declaration is to be admitted; but yet the *Kâzee* (who can judge only from appearances) must decree the emancipation of the slave.

Abou

Abou Yoosaf says that he is forsworn, in either case, upon the close of that day;—and the same difference of opinion subsists where a man makes a vow to God, (that is, where he says “by God I will drink “ of the water which is in this cup this day;) for it is a rule with *Abou Yoosaf* that the possibility of fulfilling the vow is not a condition, either of the *obligation* of the vow, or of its *continuance*;—whereas, according to *Haneefa* and *Mohammed*, the possibility of fulfilment is a condition of the obligation of the vow, and also of its continuance, because a vow is taken with a view to its accomplishment, and it is therefore requisite that the accomplishment be *possible* and *conceivable*, so as to be *obligatory*.—The argument of *Abou Yoosaf* is that although the accomplishment of the vow be impossible, yet its substitute (namely, *expiation*) is possible, wherefore such a vow may be lawfully taken, inasmuch as it is the occasion of expiation: but to this we reply that it is requisite that the original act be practicable, so as to render the taking of the vow valid, since, if the original act be impracticable, how can the vow be taken so as to give occasion for a substitute?—and hence it is that a *Yameen Ghamoos*, (or false oath made respecting a thing already past,) cannot be taken in such a manner as to occasion expiation.—If, moreover, in the case now under consideration, the words “this day” should not have been mentioned, but the vow be general, as if the man had said “if I drink not of the water in this “ vessel, my wife is divorced,” and there should happen to be *no* water in the vessel, he is not forsworn, according to *Haneefa* and *Mohammed*: but with *Abou Yoosaf* he is forsworn upon the instant.—But if there be water in the cup at the time of speaking, and it be spilled before night, the vower is forsworn, according to all our doctors.—*Abou Yoosaf* makes a distinction between an *unrestricted* and a *restricted* case; for he says that, in the *restricted* case, the vower is forsworn after the day is closed; but, in the *unrestricted* case, he is forsworn the instant he ceases from speaking; the reason of which distinction is that, as the specification of a time is made for the purpose of *extension*, the act does not become absolutely incumbent until the last instant of the time; and hence the vower is not forsworn until then; but in the *un-*
restricted

restricted case, the fulfilment is incumbent on the instant the person ceases from speaking, which being impossible, the vower is forsworn *on the instant*.—*Haneefa* and *Imâm Mohammed* also make a distinction between the *restricted* and the *unrestricted* case; for they say that where the vow is *general*, and there is water in the vessel, and it happens to be spilled, the vower is forsworn; but not where the vow is *restricted*; the reason of which distinction is that, in the *unrestricted* case, the fulfilment is incumbent on the instant the person ceases from speaking; and the fulfilment being defeated, by the thing no longer remaining, respecting which the vow was taken, the vower is forsworn, because the thing vowed is in this case defeated subsequently to the time when fulfilment was incumbent; in the same manner as if the vower should happen to die, and the water remain in the cup, in which case he would be forsworn:—but, where the vow is *restricted*, the accomplishment is not *absolutely incumbent*, until the last instant of the time specified; but the accomplishment is then impossible, because the *water*, which was the subject of it, no longer remains; and where the accomplishment is no longer possible, it is not incumbent; wherefore the vow becomes null, as much as if there were no water whatever in the vessel.

A vow made respecting an *absolute impossibility* is held as violated upon the instant.

IF a person make a vow, saying “ I will, by some means or other, ascend to heaven,” or “ I will, some how, convert this stone into gold,” this constitutes a vow *, and the vower is forthwith forsworn.—*Ziffer* says that this does not constitute a vow, since ascending to heaven, or turning stone into gold, are impracticable, in the usual nature of things, and therefore are the same as things actually impossible.—The argument of our doctors is that the fulfilment is here actually *practicable*, because it certainly is possible to ascend to heaven, as we know that the angels of God ascend the skies: and in the same

* Arab. YOONAKIDO-AL-YAMEENO, *the vow is contracted*; that is to say, is valid in its effect, and binding upon the vower. The expression, as above, is preferred by the translator, as being more familiar to an *English* reader.

manner it is possible that a stone may be converted into gold by the Almighty exerting his power for that purpose: now the thing vowed being *possible*, the vow is contracted so far as to give occasion for *expiation*; and the vower is forthwith forsworn, because of his inability, in the ordinary nature of things, to execute the thing which he has undertaken; in the same manner as if a vower were to die before the accomplishment of his vow, in which case he would be forsworn, although it be possible that he may yet be restored to life: contrary to the case of the vessel of water, because the drinking of the water undertaken to be drank is not possible in either of those cases, and therefore the vow is *null*.

CHAP. VII.

Of Vows with respect to *Speaking* and *Conversing*.

IF a person make a vow, saying "I will not speak to such an one," and he should afterwards speak to that person while asleep, from such a distance as may be within his hearing, he is forsworn; because he has spoken to that person, and the words have reached his ears; although, in consequence of being asleep, he may not have heard them, and it is therefore the same as if he had called to that person from a place within his hearing, and the person be not sensible of his addressing him through inattention.—In some passages of the *Mabsoot* it is said that it is conditional to the violation of the vow that the person sleeping be *awaked* by the words spoken; (and in this opinion our doctors coincide;) because, if he be not *awakened*, it is the same as if the speaker had

A vow against speaking to such a person is violated by speaking to him within hearing distance, although he be asleep.

had called to him from a place so distant as not to be within hearing, in which case he would not be forsworn, and so here likewise.

Case in which the violation of the vow depends upon the meaning of the terms used in it.

If a man make a vow that “ he will not speak to such an one “ *without his permission*,” and the person mentioned should permit him to speak accordingly, but the vower be not certified thereof until after he shall have spoken to him, he is forsworn; because the term *Izn* [permission] is derived from the word *Azân*, which signifies *indication*; or it signifies *a thing received by the ears*, which can only be done by *hearing*.—*Abou Yoosaf* says that he is not forsworn, because *Izn* signifies *licence*, which is fully understood by *tacit* consent alone;—that is, (like the *will*,) it does not depend upon any thing else: for instance, if one were to swear that “ he would not speak to such a “ person without his will,” and the person should *will* his speaking to him, but the vower be not certified thereof until after he has spoken, yet he is not forsworn, because the *will* is fully established by the person being merely *willing*, and does not depend upon any thing else.—But to this we reply that the will is merely an act of the *mind*, whereas *Izn* it not merely so, for the reasons above stated.

Case of a vow against conversing with a person for a specified time.

If a person make a vow, saying “ I will not speak to such an one “ *for a month*,”—it is to be understood *from the time of making such “ vow*, because if he were not to mention the words *for a month*, the vow would take place as a perpetual relinquishment of converse with the person mentioned; the mention *of a month*, therefore, is for the purpose of excluding from the vow any thing *beyond* one month, and hence that which is connected with the vow must be included in the vow, from the argument of the state in which it is pronounced, as being a state of *anger*, since the reason for the observance of the vow is the *anger* which occurs to the vower at that instant, for which reason converse with the person mentioned is prevented from that instant. It would be otherwise if a man should say “ by God I will “ fast for a month,” because, if the words “ *for a month*” were not mentioned,

mentioned, yet the vow would not take place as inducing a *perpetual* fast;—the mention of a month, therefore, is merely for the purpose of restricting the fast to *a month*; and as the month is indefinite, and not specified, the specification of it is left to the vower.

IF a man make a vow that “he will not speak,” and he afterwards read the *Koran* at the stated periods of devotion, he is not forsworn; but if he should, at any other time, read the *Koran*, he is forsworn. The same rule also holds with respect to the *Tasbeeh* *, *Tab-leel* †, and *Takbeer* ‡;—that is to say, if he repeat any of these at the stated time of prayer, he is not forsworn; but if he should repeat them at any other time, he violates his vow. This proceeds upon a favourable construction.—Analogy would suggest that the vower is forsworn in either case, (and such is the opinion of *Shafëi*,) because reading the *Koran*, or repeating the *Tasbeeh*, and so forth, are all *actual exertions* of the speaking faculty.—The argument of our doctors is that prayer does not come under the description of *speech*, either generally, or in the construction of the LAW, the prophet having said “*these prayers which I teach are not capable of being construed as containing any of the words of men.*”—Some have said that in our days the vower would not be forsworn, even at any *other* time than the stated periods of prayer, because the person who repeats those things is not said to be *speaking*, but *reciting*; and decrees pass accordingly.

Repetition of prayer, &c. at the stated seasons, does not violate a vow of silence.

IF a man were to say “on the day [*Yarwm*] upon which I speak to such an one, his wife is divorced §,” this extends both to the *day* and the

A vow made respecting the day extends to the night also.

* Calling upon the name of God in prayer by saying “BEESM ALLAH! *in the name of God.*”

† Repeating the *Kalma*, or creed, “THERE IS NO GOD BUT GOD, &c.”

‡ Magnifying God (in prayer) by saying “ALLAHOO AKBERO!” [*God is the greatest.*]

§ It is to be observed, in this and other similar modes of expression, that the vow is by

the *night*, because the word *day*, where it comes in context with a thing which is not a matter of continuance, means time *generally*; and as speaking to a person is not a matter of *continuance*, by the word *day*, is to be here understood *time in general*.—But if the swearer should declare that his intention in the vow was confined to the *day*-time in particular, his declaration must be credited with the *Kâzee*, because the term *Yawm* is used also in this sense.—It is recorded from *Aboo Yoosaf* that his declaration is not to be credited with the *Kâzee*, as it is contradictory to general usage.—But if the vower should, in the place of the word *day*, use the word *night*, by saying “on the *night* [*Lail*] “on which I converse,” (and so forth,) by this is to be understood *night* only, because the positive meaning of the term *Lail* is *night*, in the same manner as the positive meaning of the term *Nibâr* is *day*; but no instance is known of *Lail* being used to express time generally.

Case of a vow
of inhibition
restricted
to a particu-
lar occur-
rence.

If a person say “if I speak to *Zeyd*, unless a certain person come, “his wife is divorced,” and he should afterwards converse with *Zeyd*, before the coming of the other person, he is forsworn,—but, if *after*, he is *not* forsworn.—In the same manner if the swearer were to express himself, “if I speak to *Zeyd* *until* such an one shall have “arrived,” or “*unless* by permission of such an one,” or “*until* “the permission of such an one,”—“his wife is divorced,” and he should afterwards converse with *Zeyd*, before the arrival, or before permission obtained, of the other person, he is forsworn;—but, if *after*, he is *not* forsworn; because the arrival or permission is the termination of the vow, which remains in force *until* the termination, but discontinues upon that taking place; and he cannot be forsworn after the vow is completed.—In the case here stated, if the person named should happen to die, the vow ceases: contrary to the opinion of *Aboo Yoosaf*, for with him the vow does not drop, but the vower is forsworn if ever he should speak to *Zeyd*.—The argument of *Haneefa*

no means efficient of divorce to the woman mentioned in it, but is considered, with respect to *her*, as a vague and idle speech, and in itself void, inducing nothing more than an expiation on the part of the person speaking.

and

and *Mohammed* is that the thing prohibited by the tenor of the oath is *conversation* with *Zeyd*; and this, by his death, being rendered impossible, the vow drops of course: but with *Abou Yoosaf* the possibility is not a condition, whence upon the death of *Zeyd* the vow becomes *perpetual*.

If a man make a vow, saying "I will not speak to the slave of such a person," without intending any *particular* slave,—or, if he should express his vow "I will not speak to the *wife*," or "the friend of such a person," and the person should sell his slave, or repudiate his wife, or fall at enmity with his friend, and the vower afterwards converse with either of these, he is not forsworn, because his vow is taken as regarding a circumstance which has its existence in a matter relative to the person named, whether that matter be relation by *right of property*, as in the case of the *slave*; or relation by *connexion*, as in the case of the *wife*, or the *friend*; and when that matter no longer remains, the vower cannot be forsworn.—The compiler of this work observes that what is here said is taken from the *Jama Sagbeer*; and other authorities agree with it, in respect to the relation by *right of property*: but in respect to the relation by *connexion* the vower would be forsworn, according to *Mohammed*, because such relation is purely of an *indicative* nature, and is not to be taken in a *restrictive* sense, since the case admits the design of the vower to be a renunciation of conversation with those persons, as either of them is capable of being held an enemy, from injuries received, but not because of the relation in which they stand to the person named; the continuance of that relation, therefore, is not a condition; and hence the effect is connected with the *identical person* of either, as in a case of pointed reference;—that is, if a person say "I will not converse with *this* friend, or with *this* wife, of such a person," and he should converse with them after the falling out with the friend, or the divorce of the wife, he is not forsworn; and so here also.—The reason for what is recited in the *Jama Sagbeer* is that it is possible that the

A vow against conversing with a person described is (in relation to another) not violated by conversing with that person after the description (with respect to the other) is done away.

design of the vower may be to quit conversing with those persons on account of the relation in which they stand to the person named; (whence he has not mentioned them with any *pointed reference*;) and it is also possible that the design may be merely to quit conversing with those persons; thus a doubt exists, whether the *relation* be the *motive* to the vow or not; and such being the case, the vower is not forsworn by conversing with any of those persons after the dissolution of the relation in which they stood to the person named.—If, moreover, the man should have made his vow with respect to a person particularly specified, by saying “I will not converse with *this* slave of such an one,” or “*this* wife,” or “*this* friend,” (and so forth,) and he should converse with them after the slave shall have been *sold*, or the wife *divorced*, or the friend at enmity, he is not forsworn in the case of the *slave*, but he would be so in the case of the *wife* or the *friend*.—This is the doctrine of *Haneefa* and *Aboo Yoosaf*.—*Mohammed* says that he is forsworn in the case of the slave likewise; and such also is the opinion of *Ziffer*. And if a man were to make a vow, saying “I will not enter into *this* house of such an one,” or “I will not ride upon *this* beast of such an one,” and he should enter the house, or ride upon the beast, after the owner has disposed of them, the same difference of opinion prevails among the doctors as is above stated.—The argument of *Mohammed* and *Ziffer* is that the mention of the relation of the slave to his owner is for the purpose of indication; but pointed reference is more forcible, in indication, than the relation which a thing bears to another, as that altogether obviates doubt; wherefore regard is had to pointed reference alone, and the mention of the relation is nugatory, in the same manner as in the case of the wife or the friend.—The argument of *Haneefa* and *Aboo Yoosaf* is that the moving cause of the vow, in the case of the slave, the house, or the animal, is some property which is to be found in the person to whom they have reference; because the *house* or the *animal* are incapable of being of themselves held in enmity; and so also the *slave*, as he does not stand in a rank sufficiently respectable to admit his being an object of enmity;

enmity; wherefore the quitting from converse with those is on account of a property which is to be found in the *proprietor* of them; and hence the vow is restricted to the continuance of the right of the owner: contrary to a case of relation by connexion, such as the relation of the wife or the friend; as enmity and separation from them may be the design, for which reason the mention of the relation in which they stand to the person named is merely for the purpose of indication; and it is evident that the moving cause of the vow, with respect to them, is some property which is to be found in *themselves*, and not in the person to whom they have reference; because they are mentioned with a pointed reference: contrary to the case of the slave, the house, or the animal, as in those cases the thing mentioned is incapable of being of itself held in enmity, unless on account of some property to be found in the person in reference to whom it is mentioned, namely the *proprietor*.

If a man make a vow, saying "I will not speak to the owner of this *turban*," and the owner of the turban should afterwards sell it, and the vower should thereafter converse with the said person, he is forsworn; because here the mention of the relation of the thing to the person is purely for the purpose of indication, since men do not fall at variance with turbans; and hence it is the same as if he had spoken with a pointed reference to the owner of it, by saying "I will not speak to this owner of a turban;" in which case he would be forsworn; and so here likewise.

If a person make a vow, saying "I will not converse with this youth," and he should afterwards converse with him when he has arrived at an advanced age, he is forsworn; because the effect is connected with the person mentioned; as a descriptive expression is not necessary to specify a person who is present, and the description of youth cannot be considered as the motive to the vow.

A vow against
conversing
with such a
youth is vio-
lated by con-
versing with
him after
manhood.

SECTION.

Vows respecting converse, with a reference to time.

If a person make a vow, saying “ I will not converse with such an one for a *time*,” [*Hyne*,]—or “ for a *space of time*,” [*Zimán*,] by these modes of expressing time is to be understood six months; because *Hyne* sometimes means a short space of time, and sometimes forty years; and it also is sometimes used to express a *few months*;—and the space of *six months* is a medium between these extremes; wherefore, by the term *Hyne* is here to be understood six months. The principle upon which this proceeds is that a *very small* space of time cannot be designed for the *prevention of conversation*, as *prevention* may apply to a *little* space of time, in *common usage*, wherefore in such a case a vow is unnecessary for *prevention*; and a *very long* space of time is not designed for prevention, as that stands as a *perpetuity*: moreover, if he had omitted *all mention* of time, by not introducing the word *Hyne*, his vow would be taken as meaning to quit converse with the person named *for ever*; but as he mentioned *time*, it appears that his design is not *perpetual*; since if it were so, he would have omitted the word *Hyne*, or have used the word *Abid*, [for ever;] and such being the case, it is ascertained that his intention in the word *Hyne* is *six months*:—and so also of the word *Zimán*, as that is used in the same sense with *Hyne*.—What is here advanced proceeds upon a supposition that the vower had no particular intention: but if he should have intended to express any *particular space* of time, it is to be understood according to his intention, because that is the literal meaning of the words aforesaid *.

* Some grammatical controversy here follows respecting the word *Dehr*, which does not admit of an intelligible translation.

IF a person make a vow in the following terms, saying “ I will “ not speak to such an one for days,” [*Ayám,*]—by the word *Ayám* is to be understood *three* days: but if he should use the *restricting article*, saying “ I will not converse with such an one for *the* days,” [*Al-Ayám,*] by this is understood *ten* days, according to *Haneefa*,—and a *week*, according to the two disciples. If the vower, also, were to express himself, “ I will not speak to such an one for *months*,” [*Shoo-boor,*] by this is understood *ten months*, according to *Haneefa*,—and a *year*, according to the two disciples:—and if he should vow, saying “ I will not converse with him for *weeks*,” [*Joomá,*] or “ for *years*,” [*Soonatine,*]—by *Joomá*, (according to *Haneefa*,) is understood *ten* weeks,—and by *Soonatine* *ten* years; but the two disciples understand by either of these the *whole life* of the swearer. The arguments here, on both sides, are deduced from certain grammatical points in the *Arabic*.

IF a man make a vow with respect to his slave, saying “ if you “ serve me for *many days* [*Ayámoon Kaseeritoon*] you shall become “ free,”—by *many days* (according to *Haneefa*) is understood *ten* days, because *ten* is the greatest number comprehended in the term *Ayám*, which is the plural of *Yawm*.—The two disciples, on the other hand, say that by the words *many days* are to be understood *seven* days only, because any thing beyond is an excess.—Some have asserted that if a man were to make this vow in the *Persian* tongue, by *many days* is understood *seven*, with all our doctors; because in the *Persian* language there is no difference between *more* than ten days, and *less* than ten, for men say “ *ten* days or *more*,” without expressing day in the *plural**.

* This and the preceding case turn upon certain points of grammar. In the *Arabic* language are four sorts of plurals, of which one is termed a *plural of paucity*: some of the commentators suppose (with *Haneefa*) that this species of plural expresses any number up to *ten*, whilst others maintain (with *Mohammed*) that the utmost number which can be expressed by it is *seven*.—In the *Persian* language a noun is always expressed in the *singular* when preceded by a plural numeral, although it consequently has a plural signification.

C H A P. VIII.

Of Vows in Manumission and Divorce.

Divorce vowed on condition of the birth of a child takes place although the child be still-born.

IF a man say to his wife * “ whenever you bring forth a child, “ you shall become divorced,” and she should afterwards be delivered of a dead child, divorce takes place upon her;—and in the same manner, if a man say to his female slave “ whenever you bring forth a child, you shall become free,” and she should afterwards be delivered of a dead child, she becomes free;—because the condition, (namely *childbearing*) is fulfilled, as an infant, though still-born, is yet actually a *child*, and it is also termed a child by general usage. Regard is moreover had, in law, to such a birth, whence it is that the *Edit* is accomplished by it: and the discharge which follows the birth of a *dead* child is termed *Niffās*, as well as that which follows the birth of a *living* child: and in the same manner the mother of such a child, where she happens to be a *slave*, and her owner acknowledges the child, becomes an *Am-Walid*.

Freedom vowed in favour of a child that may be born of a female slave takes place on her first *live-born* child.

IF a man say to his female slave “ whenever you bring forth a “ child, that child is free,” and she be afterwards delivered, first of *one* child *dead*, and again of *another* child *living*, in this case the living child alone is free,—that is to say, *that* one is free, but no *other* who may be born *afterwards*.—This is the doctrine of *Haneefa*.—The two disciples say that no child whatever is emancipated, because the con-

* In this and all the corresponding cases, the *form* of the vow, although omitted here for the sake of brevity, is always to be understood as preceding the sentence—thus “ BY “ God, *whenever you bring forth, &c.*” or “ I vow, *whenever, &c.*”

dition of the vow has already taken place in the birth of the dead child, for the reasons stated in the preceding case; and hence the vow is dissolved, without its consequence,—(that is, the vow is accomplished and done away, without its consequence taking place,)—as the dissolution of a vow does not depend upon the induction of its consequence: thus if a man were to say to his wife “if you go into such a house, “you are divorced,” and she enter that house after having been repudiated by a complete divorce, and her *Edit* be past, the vow is dissolved without its consequence; and so also in the present instance, as a dead child is not a proper subject of manumission.—The argument of *Haneefa* is that the term *Walid* [a child] as expressed in the vow, although it be applicable to one born *dead*, yet in the present case is restricted to the description of *living*, because the design of the vower is to bestow *freedom* upon a child, and as this is a power by virtue of which the despotic authority of others over the person endowed with it is removed, it cannot possibly be established in one who is *dead*. The term *Walid*, therefore, expressed in the vow, is restricted to the *living* description; in the same manner as where a master says to his female slave “whenever you are delivered of a *living* child, such “child is free,” and the slave is delivered of a dead child, and afterwards produces a living one;—in which case this living one is free; and so here likewise.—It is otherwise where *divorce* or *manumission* has been suspended upon the birth of a child, for there the divorce or manumission so suspended takes place; as in this instance it is not requisite that the birth be restricted to the *living* description, since the life of the child is not necessary to the divorce of the wife, or the manumission of the slave.

If a man say “the first slave that I purchase is free,” and he should afterwards buy a slave, such slave is free, because the word *first* points to the prior single slave, which applies in this instance:—but if the vower, in such a case, were to purchase *two* slaves *together*, and afterwards a *third*, none of these slaves is free, because singularity

Case of a vow
of freedom to
the *first* pur-
chased slave.

does not apply to the *third* slave, wherefore he is not the *first*. If, however, this man had said “the first slave that I purchase *singly* is free,” the third slave would be liberated, because here the vower has intended *singularity at the time of purchase*, and this one is the first with respect to such singularity.

Case of a vow of freedom to the *last* purchased slave.

IF a man say “the *last* slave that I buy is free,” and he should purchase a slave, and then die, yet the slave so purchased is not free; because the term *the last* applies to the *individual adjunct**, and as no other has preceded this one, he cannot be considered as *adjunct*; but if the vower were to die after having purchased another slave, this slave is free as being the *individual adjunct*. It is to be observed that this second slave is free (according to *Haneefa*) from the day of purchase; and being free from the date of the purchase, the same is regarded as from the *whole* of the property of the deceased, on account of his having released him during health.—The two disciples say that he is emancipated upon the death of that person, and hence it is regarded as from the *third* of his property only, on account of the deceased having emancipated him *upon his deathbed*: for they argue that the posteriority of that slave cannot be fully established, until such time as it becomes certain that no other can be purchased *after* him; and this cannot possibly be determined but by *death*; hence the condition is found upon the master's decease, and the freedom of the slave is therefore also established upon that event. The argument of *Haneefa* is that the posteriority of the slave is ascertained by the master's decease, but the description of posteriority applies to him from the period of the purchase.—The suspension of a *triplicate* divorce upon posteriority is also subject to the same difference of opinion:—in other words, if a man vow “the last woman I marry shall be *thrice* divorced,” and he first marry one woman, and afterwards another, and then die, three divorces take place upon the second wife, according to *Haneefa*,

* Arab. *Fard Lahik*.—It is a term used solely in grammar.

inſomuch that ſhe cannot inherit of the deceaſed: but according to the two diſciples the three divorces take place upon her from the day of her huſband's deceaſe, and conſequently ſhe does inherit of him.

If a man ſay “ whoever of my ſlaves congratulates me upon the “ delivery of my wife ſhall be free,” and afterwards ſeveral of his ſlaves ſucceſſively ſhould inform him of his wife's delivery, the one who firſt brought the intelligence only is free; becauſe by *Bifhârit* [which is here rendered *congratulation*] is meant any *intelligence which works a change upon the countenance*, whether that intelligence be agreeable or otherwiſe, (but yet in common uſage, it is requiſite that the intelligence be agreeable,) and this deſcription is fully found only in the *firſt* intelligence,—not in the *ſecond*, or *third*, becauſe no change is by that wrought upon the countenance.—If, however, the ſlaves all bring him the news *together*, they are *all* free, as the *Bifhârit* then proceeds equally from *all*.

Caſe of a vow of freedom to whoever of his ſlaves ſhall congratulate the vower on the birth of a child.

If a man were to ſay “ if I purchaſe a ſlave he ſhall be free,” and he afterwards purchaſe a ſlave, with a view, by his releaſe, to effect the expiation of a vow, this does not ſuffice for expiation; becauſe it is requiſite that the intention of expiation be aſſociated with the occaſion of manumiffion, which is not the caſe here, as the *vow* is the cauſe of manumiffion in the preſent caſe, and at the time of making it expiation was not the intention of the vower; and as to the *purchaſe* of the ſlave, that is not the *occaſion* of the manumiffion, but rather the *condition* of it.

The emancipation of a ſlave, in conſequence of a vow, does not ſuffice for expiation:

If a man purchaſe, as a ſlave, his own father, with a view to the expiation of a vow, it ſuffices, with our doctors. This is contrary to the opinion of *Ziffer* and *Shafëi*, who contend that the act of purchaſing a father is the *condition* of manumiffion, and not the *occaſion* of it, as the *occaſion* of it is *relationship*; (for *purchaſe* is an *establishment* of right of property,

but the emancipation of a father, in conſequence of purchaſe, ſuffices.

perty, and *manumission* is a *destruction* of that right, and each of these is repugnant to the other, wherefore it is impossible that *purchase* should be the *occasion* of *manumission*;) and it thus appearing that the cause of the manumission is *relationship* and not *purchase*, the *intention* of the manumission is not associated with the *cause* of it.—The argument of our doctors is that the purchase is blended with the manumission, as the prophet has said “*no child makes so effectual a return to his parent*” “*as one who, finding his parent the slave of another, purchases, and*” “*thereby emancipates him,*”—which proves that the prophet constituted the *purchase itself* a manumission, as there is here no other condition of manumission except purchase, according to all the doctors.

The emancipation, (by purchase,) of a female slave, by a person to whom she stands in the relation of an *Am-walid*, does not suffice.

IF a man purchase, as a slave, a woman who has borne him a child, with a view to the expiation of a vow, it does not suffice.—The nature of this case is thus. A man marries the female slave of another, and she produces a child to him, and he says to her “if I at any time hereafter purchase you, you shall become free, as an expiation of my vow,” and he afterwards purchase her, when the woman becomes forthwith released, because of the occurrence of the condition upon which her emancipation was suspended; but this does not suffice for the expiation of a vow, because the slave is a claimant of freedom in virtue of *Isteelád**, and hence her freedom is not purely in consequence of the vow, and therefore does not suffice for the expiation of a vow.—This case is contrary to one where a man says to a female slave, who has not borne a child to him, “if I purchase you, you shall become free as an expiation for my vow,” and he afterwards purchase her; for in this case the slave becomes free, and her freedom suffices for an expiation of his vow, because the slave is not in this instance a claimant of freedom on any other ground, she being emancipated purely in consequence of the vow, and not of any thing else;

* Her master claiming the child born of her as his own. (See *Claim of Offspring*.)

and

and the intention of expiation is found associated with the occasion of the manumission:—she is therefore emancipated; and it suffices for an expiation.

If a man say “if I make a concubine of a female slave, she shall be free,” and he should afterwards make a concubine of any female slave, his own property, she is free accordingly; because the vow has been taken with respect to that slave, she being the property of the vower.—The principle upon which this proceeds is founded on the grammatical construction of the vower’s words in the original *Arabic*; and it is accounted for thus:—the expression “*a female slave*,” in the case in question, is *indefinite*, and an indefinite noun is comprehended, in an instance of prohibition, in the way of general individuality*: now here this expression stands in the place of a prohibition, with regard to the *design*, (as the design of the vower is to prohibit himself from *concubinage*,) and such being the case, the expression “*a female slave*” applies to every slave individually.—If, however, the vower were to *purchase* a slave, and make her his concubine, she does not become free.—This is contrary to the opinion of *Ziffer*, for he maintains, that she also becomes emancipated; because, as it is not allowed to a man to make a concubine of any woman who is not his *property*, it follows that the mention of *concubinage* is equivalent to the mention of *a right of property*; being the same as if a man were to say to the wife of another “If I divorce you, my slave is free,” which is equivalent to his saying “if I marry you, and afterwards divorce you,”—and so forth;—because, as divorce cannot take place without property by marriage, the mention of *divorce* may be said to amount to a mention of *marriage*;—and so also in the present case.—The arguments of our doctors on this point are, that a vow of manumission is not of any effect, excepting in a case of *actual* right of property, or

Case of a vow of freedom to a female slave on condition of concubinage.

* Literally, “in the way of *universality* of *singularity*:”—this is a technical phrase, the sense of which is best explained by the *context*.

where

where it is referred, either to the right of property itself, or to the *cause* of the right; and not one of these is found in the present case. There is no *actual* right of property, evidently; nor is there any *reference* to the right of property, as the vower did not say “If I *become* “*possessed* of a female slave, and make that slave my concubine;” nor is there any reference to a *cause* of right, as the vower has referred only to *concubinage*, and that is not a *cause* of right of property in a slave, because *Haneefa* and *Mohammed* define concubinage [*Tesirree*] to signify merely “a man’s keeping his slave up, and providing a dwelling for her, and preventing her from going abroad, and having “carnal connexion with her, whether he claim the children born “of her or not;” (*Abou Yoosaf* holds that the claim of children is also a condition, as a *concubine* is, in general usage, one whose children are claimed;)—and no one of these particulars is a *cause* of right of property.—Yet a *right of property* being requisite to concubinage, must, in the present instance, be taken for granted, as an essential, from the necessity of the *concubinage* (which is the condition) being *legal*: this right of property, however, is taken for granted only so far as is necessary, and does not appear with respect to the consequence, (namely, *emancipation*,) because whatever is established merely from *necessity*, does not pervade beyond the point of necessity. With respect to the example of *divorce*, cited by *Ziffer*, it may be replied that the consequence induced (namely *emancipation*) is there admitted only on account of the vow being made with respect to *actual property*, (for the slave is at the time the property of the vower;) and the *marriage*, which is there taken for granted, as a necessary inference, is so only with respect to the *condition*, (namely, *divorce*,) but not with respect to the *consequence*; insomuch that if the man were to say to the strange woman “if I divorce you, you are divorced thrice,” and he afterwards marry her, and divorce her, yet *three* divorces do not take place, as the condition had not been declared either under an *actual* right of property, or in *reference* to such right, or to the *cause* of

of it:—this case, therefore, is analogous to the case in question, for this reason, that in both of them the establishment of the *condition* is merely for the purpose of admitting *that*, but does not pervade to the admission of the *consequence*.

If a man say “every person my property is free,” his *Am-Walids*, and *Modabbirs*, and *Abids*, all become free accordingly, because the reference to a right of property with respect to them is complete, as all these are the actual property of the swearer: but his *Mokâtibs* do not become free, unless such be the intention, because absolute possession does not apply to a *Mokâtib*, whence it is that his master is not the proprietor of his acquisitions, and also that it is not lawful for a master to have carnal connexion with his *Mokâtiba*: contrary to a *Modabbira*, or *Am-Walid*:—reference to a right of property, therefore, with respect to a *Mokâtib*, is incomplete and deficient, for which reason intention is requisite.

A general
vow of free-
dom to slaves
includes
every descrip-
tion of them.

If a man, having three wives, say of them “this one is divorced, “or *this*, or *this*,” divorce takes place upon the last wife; and it remains in the choice of the husband to declare and specify which one of the other two should become divorced, whether the *first*, or the *second*; because the vow, as above expressed, is the same as if he had said “one of you two is divorced,—and also *this* one.”—The ground of this is found in the grammatical construction of those words in the *Arabic*.—In the same manner, if a master should say, with respect to three slaves, “this one is free,—or *this* one,—or *this* one,”—the *last* becomes free, and it remains at the option of the master to specify which of the others shall be free, the *first* or the *second*.

Case of a vow
of divorce in-
definitely ex-
pressed.

C H A P. IX.

Of Vows in Buying, Selling, Marriage, and so forth.

A vow against the performance of certain acts is not violated by procuring an agent to perform those acts;

IF a man make a vow, saying “ I will not *sell*, or *purchase*, or *hire* “ or *let out at rent*,” and he should afterwards appoint any person his agent, to buy, or sell, or so forth, he is not forsworn; because the agent is the contractor, and not his *constituent*, insomuch that all the rights of the contract appertain to the agent, not to his constituent; (whence, if the vower himself were a party to the contract, he would be forsworn;)—and such being the case, the condition of violation, namely, the *contract of the principal*, is non-existent, nothing attaching to him, excepting only the *effect* of the contract, not the *contract itself*. He is, therefore, not forsworn, excepting where he so intends, (as this is injurious to himself,)—or where the principal is a person of high rank, and consequently is not accustomed himself to make contracts, in which case he would be forsworn by directing another to act for him; because a vow is made for the purpose of restraining from the commission of some customary act; and it is usual for such a person to transact all concerns of purchase or sale by commission; hence where he gives his orders to another respecting such transactions, and the other executes those orders, he is forsworn.

except in a case of marriage, manumission, or divorce;

IF a man make a vow, saying “ I will not *marry*,” or “ *divorce my wife*,” or “ *liberate my slave*,” and he should afterwards commission another person to perform any of these acts for him, by a power of agency, and the said agent do so accordingly, the vower is forsworn; because the agent in such concerns acts merely as the *negotiator*,

tiator, or in the manner of a *messenger*, whence it is that he does not refer such acts to himself, but to his employer, to whom the rights thereof appertain, and not to the agent. Here, however, if the vower were to declare that his intention in the vow was restricted to such *marriage, divorce, or manumission*, as might be executed by *himself* alone, yet his declaration is not to be credited with the *Kâzee*: but it is credited with God.—The reason of this shall be explained in a subsequent case.

If a man make a vow, saying “I will not beat my slave,” or “I will not kill my sheep,” and he should afterwards order another to do either of these, and the other act accordingly, the vower is forsworn; because a master has authority to beat his own slave, or to slay his own sheep, and is therefore entitled to authorize another to do so; and the advantage thereof results to him; whence he may be said to be himself the executor of either of these acts, because the rights of them do not in any respect appertain to the person so ordered.—But if the vower should explain that his intention was to restrain himself from the performance of such acts *as executed by himself*, his declaration is to be admitted by the *Kâzee*: contrary to the preceding case of divorce, &c. where the declaration is not credited by the *Kâzee*. The reason of this difference is that divorce merely signifies a speech which goes to the repudiation of a wife; and a commission to effect divorce resembles such a speech; as the vow therefore extends to both of these, where the vower’s intention was that he would not pronounce a divorce *himself*, he must have intended a particular restraint only, from a thing which was general in its application, [his vow,] and hence his declaration, although it be admitted with God, is not to be credited by the *Kâzee*, as it contradicts appearances:—but the beating of the slave; or the slaying of the sheep, on the other hand, are perceptible acts, visible in their effects, and are immediately referable to the director of them in the way of an efficient cause, (since he is the cause of the beating or slaying,) and such being the case, where he intended, by

or any act,
the rights of
which solely
appertain to
the vower:)

his vow, to restrain himself from the commission of those acts *with his own hands*, he intended what is the literal meaning of the words of his vow; his declaration, therefore, is credited with God, and with the *Kâzee* also.

nor by employing another to do the thing, where the advantage results solely to the subject of the vow.

If a man make a vow, saying “ I will not beat my child,” and he should afterwards order another to beat the child, and the other should beat it accordingly, the vower is not forsworn; because the advantage of the beating, namely, *instruction*, results to the child, and hence the act of the person directed must not be referred to the *director*. It is otherwise where a person directs another to beat his *slave*, for there the advantage (namely, *obedience*) results to the *director*, in consequence of his order, and hence the act of the person directed may be said to be the act of the *director* *.

A vow of freedom conditioned upon the sale of a slave takes place on the instant of sale, and the sale is null.

If a person make a vow, saying “ if I sell this slave he is free,” and he afterwards sell that slave under a condition of option †, he [the slave] is free, because the conditions of his freedom (namely *sale* and *possession*) being both accomplished, the consequence, which is emancipation, takes place; and the sale is null ‡. Thus also, if a person, bargaining for a slave, make a vow, saying “ if I buy this slave he shall be free,” and he should afterwards buy that slave under a condition of option, the slave is free; because the conditions of his freedom, namely, *purchase* and *possession*, are both accomplished.—This, according to the tenets of the two disciples, is evident, because the freedom of the slave is suspended upon the act of purchase, and the

* A long case is here omitted, as it is purely of a grammatical nature, turning entirely upon the different effects of the *Arabic* particle *Lâm*, according to its different position in construction, and consequently does not admit of an intelligible translation.

† That is, upon a condition, if not approved within a trial of three days, of being returned by the purchaser.

‡ Consequently the master has no claim for the price stipulated in the sale.

condition

condition of option on behalf of the purchaser does not with them prevent the establishment of the purchaser's possession;—and so also, according to the tenets of *Hancefa*, because the freedom in the case in question is suspended by the suspension of the vower, and a thing *suspended* becomes the same as a thing *prompt*, upon the condition being found; and, as if, after purchase, under a condition of option, the buyer were to emancipate his slave *promptly*, the slave would become free by possession being first established in the purchaser *as an essential*, so also in the present case.

If a man make a vow, saying “if I do not sell this slave (or *this bondmaid*) my wife is divorced,” and he should afterwards *emancipate* the slave or the bondmaid, or should grant to either a *Tadbeer*, divorce takes place upon his wife, because the condition, namely, his *not* selling them, is fully accomplished, as sale cannot now possibly take place, since the slave or bondmaid mentioned, in consequence of the act of manumission or *Tadbeer*, remain no longer subjects of sale.

Divorce suspended upon the *not* selling of a slave takes place on emancipation or *Tadbeer*.

If a woman say to her husband “you have married another woman, in addition to me,” and the husband, in reply, make a vow, saying “every wife I have is divorced,” a divorce takes place (on the decree of the *Kázee*) upon the wife who has asserted as above.—This is the *Zábir-Rawáyet*.—It is recorded from *Aboo Yoosaf* that the wife here mentioned does not become divorced, because the words of the husband, as above recited, are to be considered merely as a *reply* to the woman, and must be received as such: moreover, the design of the husband in so speaking may be merely to *please*, and *soothe* his wife; and as this would be effected by the divorce of his *other* wives, the divorce is restricted to the *other* wives only.—The ground upon which the *Zábir-Rawáyet* proceeds is that the husband's expression is *general*, as he has introduced the word “*every*” (which argues *generality*) in addition to the simple reply, whence it appears that his intention is *generality*, and not *speciality*; and it follows that the sentence must be received as a speech *de novo*, and not as a reply.—In reply to the arguments

A vow of *general divorce* in reply to a wife charging her husband with bigamy, takes place upon *her* in the same manner as upon the *rest*.

of *Abou Yoosaf*, it is to be observed that the words of the husband admit of being construed into a design of *terrifying* and *frightening* the woman, on account of her having upbraided him with that which it is lawful for him to do; and, under such a construction, the restriction to the other wives is not admissible.—If the husband were to declare that his intention respected only the *other* wives, he is to be credited with God, but not with the *Kázee*; because he has intended a particular thing by a general expression, and his words admit of being taken in this sense; but it contradicts appearances; his declaration, therefore, is to be credited in a *religious* view, but not in point of *law*.

CHAP. X.

Of Vows respecting Pilgrimage, Fasting and Prayer.

Case of a vow
of *Mashá*.

IF a man make a vow “to perform a *Mashá* [pedestrian pilgrimage] “to the temple of God,” it is incumbent upon him to perform a pilgrimage to the *Kába* on foot,—or that he make the visitation termed *Amrit*; and if he chuse he may *ride* on his pilgrimage, or *Amrit*;—but he must in this case perform a sacrifice. This is on a favourable construction of the law. Analogy would suggest that neither pilgrimage nor *Amrit* are rendered incumbent upon him, he having engaged no farther than to walk to the temple “on foot,” which is not incumbent as an act of piety, but is merely an *indifferent* act; neither is going on foot the original design, that being simply *the performance of pilgrimage* or *Amrit*—The reasons for the more favourable construction

struction here are twofold:—FIRST, *Alee* has declared that, in a vow of this nature, either pilgrimage or *Amrit* are incumbent upon the swearer:—SECONDLY, from the expression aforesaid either pilgrimage or *Amrit* are universally understood; and hence it is the same as if he had said “I owe a visitation to the temple on foot;” wherefore it is incumbent upon him to perform his pilgrimage or *Amrit* on foot, or that, if he chuse to perform it on *horseback*, he also perform a sacrifice*.

IF a man make a vow, saying “if I do not perform a pilgrimage “this year, such an one, my slave, is free,”—and after the lapse of that year a dispute should arise between the master and the slave,—the slave alleging that the master had *not* performed the pilgrimage, and the master alleging that he *had* performed it, and the slave’s witnesses bear testimony in this manner,—“that the master had performed, “within that year, a sacrifice at *Koofa*,” the slave (according to *Haneefa* and *Aboo Yoosaf*) is not emancipated.—*Imám Mohammed* says that the slave is emancipated, because the witnesses have testified to the master having performed sacrifice at *Koofa*, which is a well known act, and which necessarily implies that he has not performed *pilgrimage*, and hence the condition of the penalty, (namely, non-performance of pilgrimage,) is fulfilled.

Case of a vow of manumission suspended upon the non-performance of pilgrimage.

IF a man make a vow that he will not fast, and he should afterwards intend a fast, and keep the same a short time, and then break his fast within the same day, he is forsworn on account of the condition of violation being fulfilled; because the word *Sawm* [fast] signifies abstinence from those things the use of which breaks a fast kept with a pious intent, which in this case is evident.

Case of a vow against fasting.

* Most of the expressions here treated of are to be fully understood only in the original idiom; hence much of the reasoning upon them is lost in a translation. Two other cases are here omitted for the same reason, and also because the rights of individuals are no way concerned in them.

Case of a vow
against fast-
ing for a day.

IF a man make a vow that “ he will not fast *a day*,” and he afterwards intend a fast, and observe the same for a *few hours* (for instance) and then break his fast, he is not forsworn, because he intended such a fast as is regarded in the LAW, and that is not completed until it be accomplished by the ending of the day: moreover, the full time of *a day* is expressly mentioned in his words, “ I will not fast *a day*,” and therefore it is to be so understood.

Case of a vow
against pray-
ing.

IF a man make a vow that “ he will not pray,” and he should after that stand up and perform *Kiraât*, [reading the *Koran*,] or *Rookoo*, [a submissive posture used in prayer,] he is not forsworn: but if he perform the *Soojda* along with those other ceremonies, he is forsworn. This proceeds upon a favourable construction.—The suggestion of analogy is that he would be forsworn in consequence of beginning to pray, from the correspondence of this with a case of fasting; that is, if a man make a vow that “ he will not fast,” and he should afterwards keep a religious fast, he would be forsworn upon the *commencement* of it; and so also in the present case. The reason of this is that a person, upon beginning to pray, is termed a *Moosillee*, or *praying* person, in the same manner as one beginning a *religious* fast is termed *Sáyim*, or *faster*: but the reason for a more favourable construction is that prayer implies and includes a variety of ceremonies, such as *standing*, *kneeling*, and *prostration*;—and hence, until the *whole* of these be performed, it is not termed *prayer*: contrary to *fasting*, as that consists of only one single observance, namely, *abstinence*.

IF a man vow that “ he will not perform prayer according to the “ ordinance of the LAW,” he will not be forsworn *upon praying*, until he come to that part of the ceremony which requires the second genuflection; because, by the above mode of expression, he appears to mean that kind of prayer which is regarded in the LAW; and the smallest degree which constitutes that is *two* genuflections, as the prophet has forbidden *short* or *interrupted* prayer.

C H A P. XI.

Of Vows respecting Clothing and Ornaments.

IF a man make a vow, saying to his wife “ if I put on any of your work, (that is, *cloth made of thread of your spinning,*) such cloth is “ *Hiddee*, (that is, *an offering at the shrine of the prophet,*)” and that man should afterwards buy cotton, and his wife spin it into thread, and of that thread cloth be woven, and the man put on the same, it is incumbent upon him (according to *Haneefa*) to make an offering thereof at *Mecca*. The two disciples have asserted that it is not incumbent upon the vower, in the case in question, to make an offering of his cloth, unless where the thread has been spun of cotton which was his [the vower’s] property at the time of his making the vow; for they contend that a *Noozr*, or *devoting* vow, is not valid, unless it respect actual property, or be pronounced in a way which has reference to the cause of a right of property; and neither of these are existent in this case, as the vower putting on the cloth, or the woman spinning the thread of which it is composed, are not causes of a right of property to the vower.—The argument of *Haneefa* is that it is customary for a wife to spin her husband’s cotton, and whatever is customary, the same is meant and intended; and the act of the wife, in spinning the cloth, is a cause of the husband’s right in it*; here there-

Vow of a husband against wearing cloth of his wife’s manufacture.

* According to the *Mussulman* law, any change wrought in the descriptive quality of goods (such as turning *cotton* into *thread*) causes in itself a transfer of the property from the former proprietor to the person who makes or effects such change in it, independant of any previous contract of purchase, the person to whom such transfer of property is made remaining responsible to the original proprietor for the value of the goods in their former state. (See *Usurpation of Property*.)

fore appears a reference of the *Noozr*, or *devoting* vow, to the *cause* of a right of property, wherefore the vow is valid; and hence the vower is forsworn upon the wife spinning cotton which was his property at the time of the vow *.

If a man make a vow that “he will not sleep on such a bed,” and he should afterwards sleep thereon, it having a sheet, blanket, quilt, or so forth, spread over it, he is forsworn; because such covering is also an *appurtenance* to the bed, and hence sleeping on the *covering* may be said to be sleeping on *such bed*. But if another bed be laid upon the bed which is the subject of the vow, and the swearer sleep thereupon, he is forsworn, because a thing cannot be an appurtenance to a *similar* thing, and hence sleeping upon this bed is not to be accounted sleeping upon the other.

If a person swear that “he will not sit upon the ground,” and he should afterwards sit upon a carpet or mat spread thereon, he is not forsworn; because a person in such case is not said to be sitting on *the ground*. It is otherwise where the skirts of his garment only are between the ground and him, as his *garment* is merely an *appurtenance* to *himself*, and hence is not to be considered as the thing upon which he sits.

If a man vow that “he will not sit upon such a seat,” and he should afterwards sit thereupon when there is a covering spread upon it, he is forsworn; because the person who sits upon that covering is considered as the occupier of that seat, in common usage, as this is the usual way of sitting upon a bench, or other raised seat.—It is

* Here follows a long but very frivolous case of vows against wearing *Hoollea* [superfluous ornaments] omitted in the translation, as it turns entirely upon the acceptation of the term *Hoollea*, which has been held to consist of different articles at different times.

otherwise

otherwise where the feat which is the subject of the vow has another feat set over it, and the vower sits upon the *upper* feat, for then he is not forsworn, because the second feat is a fellow to the first, and a thing cannot be an appurtenance to a *similar* thing, (as has been already observed;) sitting upon the *second* feat, therefore, is not to be accounted the same as sitting upon the *first*, which was the subject of the vow.

C H A P. XII.

Of *Vows* concerning *Striking*, *Killing*, and so forth.

IF a person make a vow, saying [to another] “ if I strike you, my slave is free,” and the vower should strike that man after his death, he is not forsworn; because *striking* is restricted to *life*, as being the name of an action which gives pain, and excites the feelings of the person struck, which is not possible with *the dead*. So also, if a man were to say to another “ if I clothe you, my slave is free,” and he should after his death clothe him, he is not forsworn; because by clothing, when it is indefinitely expressed, is meant a complete transfer of property in the article of clothing, and this transfer cannot be made to a defunct; unless when the vower by clothing simply meant *covering*, in which case he would be forsworn, for here he intends his words in a sense which they are capable of bearing.—(Some doctors say that, if a person were to make a vow in the *Persian* tongue, saying to another “ if I clothe you, my slave is free,” and he should clothe that person after his death, he is forsworn; because by this, in the

A vow made against *striking* a person is not violated by striking that person when *dead*: and the same of a vow against *clothing*.

*speaking to,
going to,*

vulgar idiom, is meant simply *covering*.)—In the same manner, if a man were to make a vow, saying to another “if I *speaking* to you, my “slave is free,” or “if I *coming* to you,” and so forth, and he should *speaking* to, or *going* to, that person *after his death*, yet he is not forsworn; because the intent of speaking is *to impart ideas*, which death prevents the possibility of; and “*coming to the dead*” implies a *Zeeârit*, or *visitation*, which is not to the *dead*, but to the *shrine* or *Mausoleum* of the dead.

*or washing a
person.*

If a man make a vow, saying to another “if I wash you, my “slave is free,” and he should wash that person after his death, he is forsworn; because to *wash* simply signifies *to ablute with a view to purification*, which takes place in the ablution of the dead.

A vow against
beating is vi-
olated by any
act which
causes pain,
unless that act
be committed
in *sport*.

If a man make a vow that “he will not beat his wife,” and he afterwards pull her hair, or seize her by the throat, or bite her with his teeth, he is forsworn; because *beating* is the term for an act which causes pain, and pain is excited by the acts in question.—Some have asserted that if these acts are done in the course of mutual *playing* and *dalliance*, the vower is not forsworn, because under such circumstances these bear the construction of *jest*s, and not of *beating*.

Vow of *slay-*
ing a person
who is al-
ready dead
incurs the
penalty.

If a man say “if I do not slay such an one, my wife is divorced,” and the person mentioned be not living, and the vower himself know this, he is forsworn; because he here makes his vow respecting that life with which God may inspire the deceased anew,—and as this is possible, his vow stands valid; and he is then forsworn, because the *slaying* of that person is in the common course of things impossible. If, however, the vower be not aware of that person’s being already deceased, he is not forsworn, because he has here made his vow respecting that life which he supposes to be existing in such a person, but which, in the common course of things, is no longer conceivable. There is a diversity of opinion between *Haneefa* and *Aboo Yoosaf* concerning this case, from the analogy it bears to the case of the vessel of water;—
that

that is, if a man were to vow "if I do not drink out of this cup my wife is divorced," and there should happen to be no water in the cup, he is not forsworn, according to *Haneefa* and *Mohammed*, on account of the invalidity of the vow, from the impossibility of fulfilling it: but according to *Abou Yoosaf* he is forsworn; because *he* does not hold the possibility of fulfilment to be a condition of the validity of the vow;—and so also in the present case. In the case of the *vessel of water*, however, there is no distinction made with respect to *knowledge*; that is, the vower (according to *Haneefa* and *Mohammed*) is not forsworn, whether he be aware of the cup having no water in it or not; and this is approved.—It is otherwise in the case in question, for there a distinction is made, as has been already mentioned.

CHAP. XIII.

Of Vows respecting the Payment of Money.

IF a man make a vow, saying "I will discharge my debt to such an one *shortly*," this means *within less than one month*; and if he say "I will discharge my debt due to such an one *in a length of time*," this means *more than a month*; because any space *within* a month is accounted a *short* time, and a *month* or any term *beyond* it is accounted a *long* time; and hence it is that where two friends meet after a long separation, one will say to the other "I have not seen you *this month*!" and so forth.

Difference, in a vow, between the terms *shortly*, and *in a length of time*.

A vow to discharge a debt is fulfilled by discharging it in *light* or *base* money, or in money belonging to another,

or by means of liquidation:

If a man make a vow, saying "I will discharge my debt, owing to such an one, this day," and he pay the debt upon that day accordingly, and some of the money in which he has paid it should afterwards prove *light*, or *base*, or *the right of another person*, yet the vower is not forsworn; because *lightness* is only a *defect*, which does not destroy the *specie*, (whence it is that if one of the parties, in a contract of *Sirf* sale, should through negligence receive *base* metal in return for *pure* metal, the exchange is completely fulfilled,—and so also, the feller is fully paid his price, in a contract of *Sillim* sale, where he receives *base* coin in place of *pure* coin,)—and such being the case, the condition of fulfilment (namely *the payment of the debt*) is accomplished: the vower, therefore, is not forsworn; the receipt of the money, also, where it is the right of a *third* person, is valid nevertheless, and the fulfilment thus established is not afterwards affected by the restoration of the same to that *third* person. (If, however, any of the money, after payment, should appear to be composed of *pewter*, or *tin*, the vower is forsworn; because those metals are not regarded as *specie*, whence, if through negligence they should be accepted in a *Sillim* or *Sirf* contract, it is not a lawful payment.) If, also, the vower should sell his slave to his creditor, within the course of the day, in lieu of the debt, and the creditor accept of the same, the fulfilment of the vow is accomplished; because *liquidation* is one mode of discharging debts;—that is, the debt due to one party ceases in lieu of the debt due to the other; (for the creditor is responsible for whatever he receives, as he receives it on his own account by becoming proprietor of it, and thus the same obligation rests upon the creditor in behalf of his debtor as already rests upon the debtor in behalf of the creditor;) a mutual liquidation, therefore, takes place between them, and the debt of each is remitted in lieu of the debt of the other. (This mode of discharging the debt by *liquidation* is because the *actual* discharge is inconceivable, as the debtor does not here offer any thing but *substance*, and the right of the creditor is not to *substance*, but is merely to the debt which has been incurred by the other; and hence the

learned

learned in the law say “a debt must be discharged with its *like*.”) *Liquidation*, therefore, being one mode of discharging debt, the fulfilment of the vow, in the case in question, is established, because the liquidation is established upon the instant of the sale of the slave.

OBJECTION.—The liquidation being established upon the instant of sale, why is the purchaser’s seizure of the slave made a condition?

REPLY.—Seizure is made a condition in order that the debt due to the seller, namely the price of the slave, may be fully confirmed and established, because although it be incumbent upon the purchaser from the instant of sale, yet it stands within the possibility of ceasing, as it is possible that the article sold may perish before seizure; but by seizure the debt is fully confirmed and established upon the purchaser.

—If the creditor make a gift of the debt to the debtor within the course of the day, the fulfilment of the vow is not established; because *repayment* has not taken place; and also, because the discharge of the debt is an act of the *debtor* alone, and the gift of the debt implies that the creditor relinquishes his right to it, which is an act of the *creditor*, and not of the *debtor*, wherefore the condition of fulfilment (namely, the act of the debtor) is not accomplished. It is here to be observed, however, that although the fulfilment be not accomplished, yet the vower is not forsworn, but the vow becomes void; because the vow was restricted to that day, and the creditor having *remitted* the debt within that day, the swearer is thereby effectually precluded from the fulfilment of his vow before the expiration of its term, which does not take place until the end of the day, whence the vow becomes void, in the same manner as in the case of the vessel of water*.

but not by the
gift of the
creditor.

If a debtor were to make an offer, saying to his creditor “I will discharge my debt to you, by partial payments,” and the creditor should reply, with an oath, saying “I will not thus receive my due by accepting part, and not the *whole*,” and he should afterwards

A vow not to
accept reim-
bursement of
a debt in par-
tial payments
is not violated
until the whole

* See Chap. VI. p. 524.

debt shall have
been so re-
ceived.

take a part of the debt, yet he is not forsworn so long as he receives not the *whole* debt thus by partial payments; because here the point which produces a violation of the vow is the receiving the *whole debt*, but in *partial sums*, and that has not taken place.—If the debt consist of articles computable by weight, and the vower accept payment by two or more weighings thereof, in such a manner as not to be employed in any other concern between these two weighings, he is not forsworn, although this be a partial mode of receiving payment, because the receipt of the whole at once is sometimes in any common way impossible, and hence any debt of this description is an exception from the present case.

If a creditor make requisition from his debtor of a part of what is due to him, suppose *two hundred Dirms*, and the debtor reply that “he has not so much money,” and the creditor disbelieve him, and he answer “if I possess more than one hundred *Dirms*, my wife is divorced,” and it should happen that he is, at the time of saying this, possessed of *fifty Dirms* only, he is not forsworn; because his design, in this declaration, is merely to express his denial of being possessed of more than *one hundred Dirms*; and also, because his exception of *one hundred Dirms* involves an exception of every component part or proportion of *one hundred*; and *fifty* is one of these proportions; wherefore *fifty* also are excepted, and hence he is not forsworn. And the rule is the same, if, instead of “*more than one hundred Dirms*,” he should say “*other than one hundred Dirms*,” or “*beyond one hundred Dirms*,”—because all these terms equally express *exception*.

CHAP. XIV.

Of Miscellaneous Cases.

If a man make a vow, saying "I will not do so and so," it is necessary that he for ever abstain from the commission of that act, because he has expressed the *negative* of the act *generally*, and hence the prohibition is *general*, in consequence of the negative being *unrestrictively* expressed.

A vow against doing a thing, unrestrictively pronounced, operates as a perpetual inhibition.

If a man make a vow that "he will do such a thing," and he should *once* do it, his vow is fulfilled, as he has not undertaken more than the commission of that act in one single instance unspecified, because such is to be understood from the words by which he binds himself: fulfilment is therefore established, upon his once performing a single instance of the act in question, whatever instance that may be, and whether such performance be *voluntary* or *compulsive*. In a case of this nature, moreover, the vower is never considered as forsworn, unless where he may be utterly excluded from a possibility of performing the act, which can only be by his *death*, or by the destruction of the subject of the act.

A vow of performance is fulfilled by a single instance of performance.

If a sultan, or other supreme governor, or magistrate of a kingdom or province, should require an oath of a person that "he will inform him of the dwelling of every evil doer, who shall enter that territory," and the person swear accordingly, such oath binds him to convey such information to the magistrate aforesaid, *during the existence of his authority* only, and no longer; because the intention of

An oath imposed by a supreme magistrate continues in force only during the existence of that magistrate's authority.

the magistrate, in imposing such an oath, is to repel the wickedness of evil-doers, or to prevent such wickedness in others by the punishment of those evil-doers; conveying this information, therefore, after the expiration of the magistrate's government and authority, is of no manner of use; and the expiration of the magistrate's authority takes place either on his *death*, or his *removal from office*.

A vow of gift is fulfilled by the offer of the gift, although it be not accepted of.

IF a master make a vow that "he will bestow such a slave upon such a person," and he should bestow that slave accordingly, and the person refuse such gift, yet the vow is fulfilled.—This is contrary to the doctrine of *Ziffer*, who considers *gift* to be the same as *sale*, as being equally a transfer of property; and as, if a man swear that "he will sell his slave to such a person," and that person refuse to buy the said slave, the vow remains unfulfilled, so in this case likewise.—The arguments of our doctors on this point are twofold:—FIRST, gift is a voluntary or gratuitous deed, and hence is executed on the part of the *giver* alone, independant of the *receiver*; thus we say "such a person presented so and so to such a person," although the other may not have accepted it:—SECONDLY, the design of the swearer, in making such a vow as the above, is to exhibit his own generosity and liberality; and that is effected by means of the deed of gift; but a contract of sale is a *mutual engagement*, which can be executed only by the act of both the parties concerned in it.

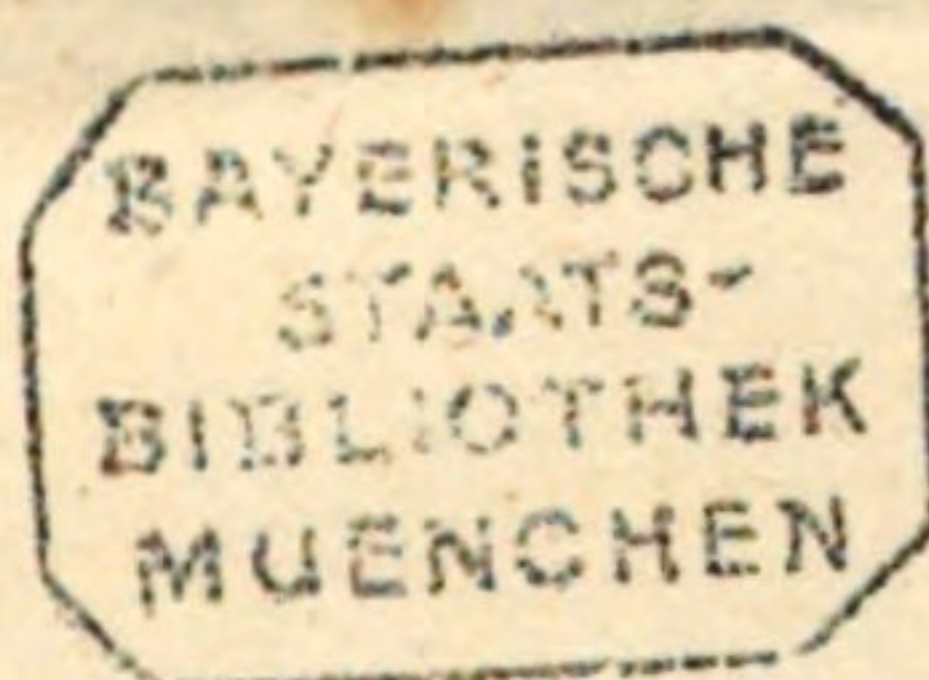
Vows in respect to odorous herbs or flowers have force according to the sense in which the denomination of them is generally taken.

IF a man make a vow that "he will not smell *Reehan*, and he should afterwards smell to the *rose* or the *jeffamin*, he is not sworn, because *Reehan* is that species of flowers which have no stalk, and the *rose* and *jeffamin* have stalks or branches from which they depend.

IF a man were to make a vow, saying that "he would not pursue *violets*," and have no particular intention therein, the vow is construed

construed to mean *oil* of violets, from general custom, according to which, a person dealing in that article is termed a *violet-feller*; and as *purchase* is founded upon *sale*, a person purchasing *oil* of violets is termed a *buyer of violets*.—(Some doctors maintain that, with us, by the term *violets* is understood the *flower* only, and not the *oil*.)—If the vower were to say that “he would not purchase *flowers*,” by this is to be understood the *leaves* only, and *not* the *oil*, as such is the literal meaning of his expression; and custom also accords with this, because by *flowers* is usually understood the *leaves* of the flowers. In the case of *violets* custom has established it otherwise, as the word *violets* is commonly used to express *oil* of violets.

END OF THE FIRST VOLUME.



continued to mean of of rights, from general custom, according to which, a section dealing in these articles is termed a "rights dealer" and as such is bounded upon (and a person purchasing of rights is termed a "buyer of rights")—(some do not restrict this, with us, by the term "rights" is understood the "rights" only, and not the "rights" only, as the vowel were to say that "he would not purchase rights" by this is to be understood the "rights" only, and not the "rights" only, as such is the usual meaning of his expression; and custom also records with this, because the "rights" is usually understood the "rights" only. In the case of "rights" custom has established it otherwise, as the word "rights" is commonly used to express only of rights.

END OF THE FIRST VOLUME.

ERRATA in the FIRST VOLUME.

Page 70, line 14, for *Yawn*, r. *Yawn*.

73, — 29, — *Ishârit*, r. *Ijârâ*.

96, — 19, — *Mokâtib*, r. *Mokhâtiba*.

106, — 11, — would, r. should.

197, — 25, — heir, r. inheritee.

281, (marg. note, l. 3 from the bottom) *dele* for.

287, line 23, for *Ajla*, r. *Aila*.

401, — 23, — and, r. for.

471, — 15, after “*assembly*,” *dele* the *comma*.

490, — 1, for descent, r. parentage.

— 12, — descent, r. parentage.

513, — 30, — “*foundation of Vow*,” r. “*foundation of the Vow*.”

521, — (note,) for aad, r. and.

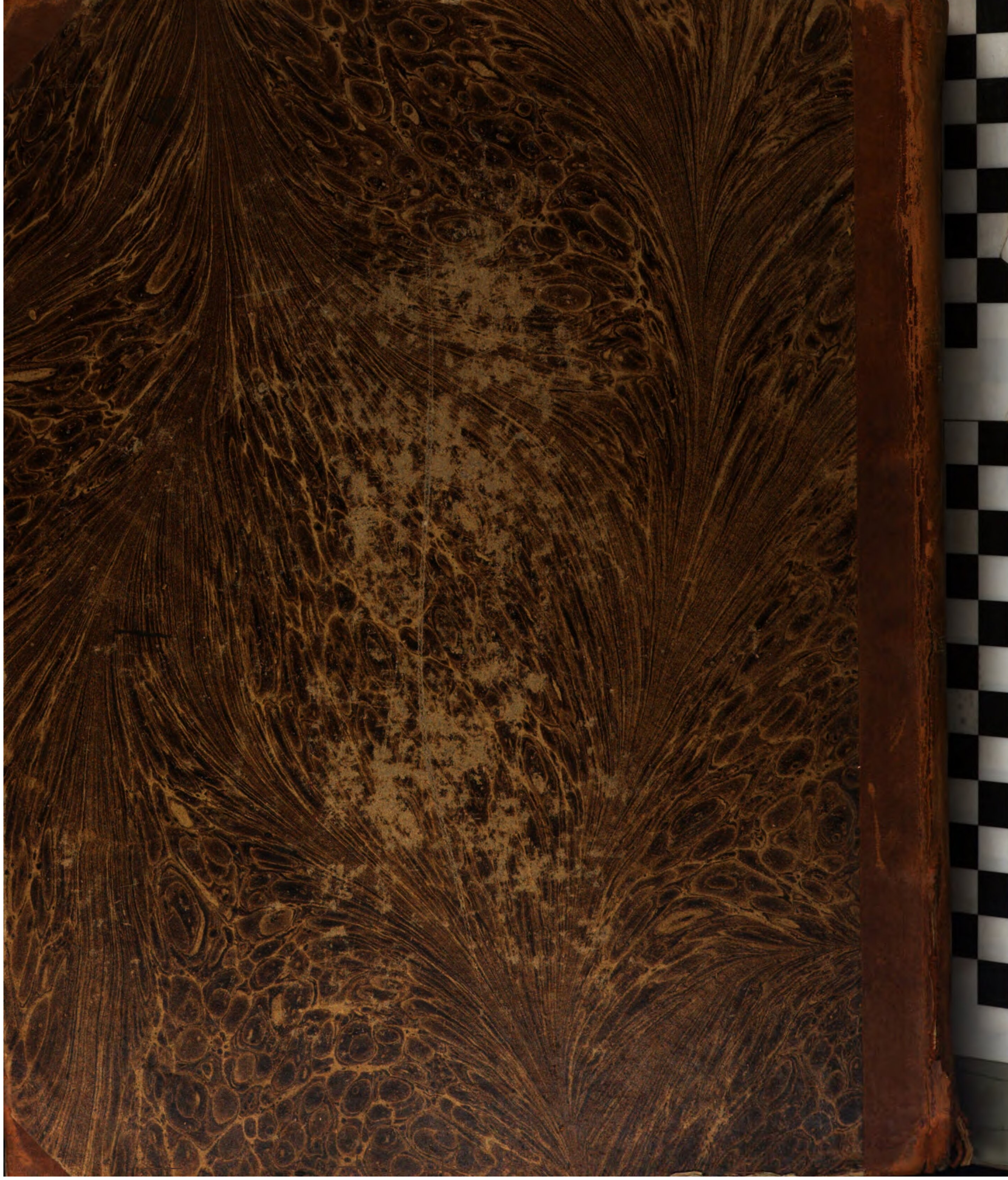
535, — — — “*of which one is termed a plural of paucity*,” r. “*which
“ are termed plurals of paucity.*”

ERRATA in the FIRST VOLUME.

Page 70, line 14, for <i>few</i> , r. <i>fewer</i> .	
13. — 29. — <i>liber</i> , r. <i>libre</i> .	
96. — 19. — <i>Melanch</i> , r. <i>Melancholic</i> .	
106. — 11. — <i>would</i> , r. <i>should</i> .	
107. — 25. — <i>heir</i> , r. <i>heirer</i> .	
281. (margin note, l. 3 from the bottom) <i>del</i> for	
287. line 23, for <i>Alia</i> , r. <i>Alia</i> .	
401. — 23. — <i>and</i> , r. <i>for</i> .	
471. — 15. after " <i>afford</i> ," <i>del</i> the comma.	
490. — 1. for <i>descent</i> , r. <i>percentage</i> .	
— 12. — <i>descent</i> , r. <i>percentage</i> .	
513. — 30. — " <i>Foundation of Vow</i> ," r. " <i>Foundation of the Vow</i> ."	
521. — (note,) for <i>and</i> , r. <i>and</i> .	
535. — — " <i>in which one is termed a plural of paucity</i> ," r. " <i>which</i> "are termed plurals of paucity."	



Schinn



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